80-1553

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT H. FENDLER, *Petitioner,*

v.

STATE OF ARIZONA, *Respondent.*

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS
and
PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

ROBERT H. FENDLER, *Petitioner,*

v.

STATE OF ARIZONA, *Respondent.*

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner, ROBERT H. FENDLER, by and through his attorney undersigned and pursuant to Rule 20 of the Supreme Court Rules, requests for good cause shown, that he be granted the extension permitted by the Rule that he may file his attached Petition for Writ of Certiorari.

In support of his Motion and in showing good cause therefor, Petitioner attaches hereto and incorporates

herein by reference the Affidavit of THOMAS E. HORN, attorney for Petitioner.

In order to establish the factual and legal basis for the Motion, Petitioner also attaches hereto and incorporates herein by reference his Petition for Writ of Certiorari.

/s/ THOMAS E. HORN,
Thomas E. Horn, Esquire
Attorney for Petitioner,
Robert H. Fendler

AFFIDAVIT OF THOMAS E. HORN

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

I, THOMAS E. HORN, being fully sworn, depose and state:

1. I am an attorney licensed to practice before the Supreme Courts of the States of California and New Mexico. I have represented Petitioner throughout all the proceedings in the State Courts of Arizona, including his trial before the Superior Court of the County of Maricopa and his appeal to the Arizona Court of Appeal as well as his application to the Supreme Court of the State of Arizona for hearing, which said application was denied. I was also retained on his behalf to file a Petition for Writ of Certiorari with this Honorable Court.

2. In preparation for filing the Petition, I researched the procedural requirements as contained in the Supreme Court Rules as those Rules were contained in United States Code Annotated, published by West Publishing Company and maintained by me in my office. The set is updated annually in the Spring by publication of pocket supplements inserted at the rear of each volume.

3. Rule 22 in the main volume provided that, "a Petition for Writ of Certiorari to review the judgment of a State Court of Last Resort in a criminal case shall be deemed in time when it is filed with the Clerk within ninety (90) days after the entry of such judgment." I examined the current pocket supplement to Rule 22 and found no change. Based on that research, I concluded that I had up to and through March 23, 1981 in which to file my Petition for Writ of Certiorari, the Arizona Supreme Court having denied Petitioner's Petition for Review on December 23, 1980.

4. On February 27, 1980, I received a telephone call from MICHAEL CUDAHY, Assistant Attorney General for the State of Arizona who has represented Arizona throughout these proceedings, advising me that no Petition for Writ of Certiorari would be timely as I had only sixty (60) days in which to file said Petition. I pulled my Supreme Court Rules Volume of U.S.C.A. and read Rule 22 and advised him that the most current pocket supplement did not indicate any amendments. He advised me that he had a copy of the Supreme Court Rules published after my pocket supplement to Rules Volume in U.S.C.A. that showed the time for filing Petition for Writ of Certiorari to review a State Court judgement had been reduced from ninety (90) days to sixty (60) days. That was the first time that I became aware of such a change.

5. It is an attorney's responsibility to see that any required pleading is filed within the proper time periods. I have always attempted to rigorously adhere to that very fundamental principle. As I maintained a copy of the Supreme Court Rules as published by West in U.S.C.A. in my office, I felt that I had properly calculated the time within which I had to file the Petition. I would respectfully request this Court to find excusable neglect.

6. I have felt from the very inception of this case in the State Courts that the Arizona Rules of Criminal Procedure challenged herein raise serious Fifth and Sixth Amendment concerns. The imposition of the serious sanction of preventing key defense witnesses from testifying as to material allegations contained in the State's case went to the very heart of Petitioner's right to due process and a fair trial. These are matters which should be reviewed by this Court and I pray that my oversight

in not becoming apprised of this recent Amendment of the Rules would not deny Petitioner his attempt to ask this Honorable Court to review those serious Constitutional questions.

7. This Court, or a Justice thereof, may upon good cause shown extend the time within which the Petition for Writ of Certiorari may be filed for thirty (30) days. This would permit filing of this Petition. Because of the inadvertent and nonintentional oversight, coupled with the serious Constitutional questions to be addressed, it is respectfully submitted that good cause has been shown to permit the extension.

FURTHER, AFFIANT SAYETH NOT.

/s/ THOMAS E. HORN
Thomas E. Horn, Esquire

QUESTIONS PRESENTED FOR REVIEW

1. Whether Arizona Rule of Criminal Procedure 15.2 which mandates total disclosure of a defendant's case, including the defendant's own testimony, within twenty (20) days of arraignment, violates the Fifth Amendment privilege against self-incrimination.

2. Whether Arizona Rule of Criminal Procedure 15.7 which permitted the Trial Court to exclude the testimony of two key defense witnesses as a sanction for non-prejudicial violation of Rule 15.2 is unconstitutional as a violation of the Sixth and Fourteenth Amendments.

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STATUTE:

28 U.S.C. §1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

ROBERT H. FENDLER, *Petitioner,*

v.

STATE OF ARIZONA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On September 11, 1980, the Court of Appeals for the State of Arizona issued its Opinion affirming in part and reversing in part, Petitioner's conviction herein. A copy of said Opinion is appended hereto as Exhibit A. The State of Arizona appealed a post-verdict Order of the Superior Court dismissing one of the counts of the indictment on the ground of duplicity. That appeal was dismissed by Opinion filed September 11, 1980. Subse-

quent to his conviction, Petitioner sought post-conviction relief from the State Courts based on newly discovered evidence. That relief was denied in a Memorandum Decision filed September 11, 1980. Those Opinions are not appended hereto as they are voluminous and are not material to the questions presented for review.

JURISDICTION

Judgment was entered against Petitioner on April 14, 1978, said judgment being handed down April 14, 1978 and filed April 18, 1978, copy of said judgment appended hereto as Exhibit B. Subsequent to entry of the Court of Appeals Opinion on September 11, 1980, appended hereto as Exhibit A, Petitioner and the State filed Motions for Rehearing in the Court of Appeals, which said Motions were denied on December 11, 1980, a copy of said Order being appended hereto as Exhibit C. Both Petitioner and the State filed Petitions for Hearing in the Arizona Supreme Court, which said Petitions were denied on December 24, 1980, a copy of said Order being appended hereto as Exhibit D.

Jurisdiction is conferred by 28 U.S.C. §1257(3), this being an Application for Writ of Certiorari to review the validity of a State Statute on the ground of its being repugnant to the Constitution of the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV, United States Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 15.2 of the Arizona Rules of Criminal Procedure reproduced in its entirety in the Appendix hereto provides in pertinent part,

"b. NOTICE OF DEFENSES. Within twenty (20) days after the arraigment in Superior Court, the Defendant shall provide the Prosecutor with a written notice specifying all defenses as to which he will introduce evidence at Trial, including but not

limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identify, and good character. The notice shall specify for each defense the persons, including the Defendant himself, whom he will call as witnesses at Trial in support thereof. It may be signed by either the Defendant or his counsel, and shall be filed with the Court.

"c. DISCLOSURES BY DEFENDANT. Simultaneously with Notice of Defenses submitted under Rule 15.2(b), the Defendant shall make available to the Prosecutor for examination and reproduction:

> "(1) The names and addresses of all persons, other than the Defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with a particular case;
>
> "(2) The names and addresses of experts whom he will call at trial, together with the results of his physical examination and of scientific tests, experiments, or comparisons, including all written reports and statements, made by them in connection with a particular case; and,
>
> "(3) A list of all papers, documents, photographs and other tangible objects which he will use at trial.

"***

"f. DISCLOSURE BY ORDER OF THE COURT. Upon motion of the Prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.2, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the Defendant's Constitutional rights, the

Court, in its discretion, may order any person to make such material or information available to him. The Court may, upon request of any persons affected by the Order, vacate or modify the Order if compliance would be unreasonable or appressive."

Rule 15.7 Sanctions.

"a. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

"(1) Ordering disclosure of the information not previously disclosed.

"(2) Granting a continuance.

"(3) Holding a witness, party, or counsel in contempt.

"(4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and

"(5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

"b. If the defendant fails to comply with Rule 15.2 the prosecution need make no further disclosure except material or information which tends to mitigate or negate defendant's guilt as to the offense charged as set forth in Rule 15.1(a)(7).

STATEMENT OF THE FACTS

On March 7, 1977, ROBERT H. FENDLER, Petitioner herein; JAMES R. HOLMAN, and LEONARD H. FORMAN, were charged in a 17 count indictment alleging criminal conduct in connection with the operation of several

financial type institutions headquartered in Phoenix and Tucson, Arizona. Pretrial motions resulted in the dismissal of five of the original counts. At the trials conclusion, four counts of the initial 17 went to the Jury. The Jury found the Petitioner guilty of conspiracy, A.R.S. §331 (now A.R.S. §13-1003), false book entry, A.R.S. §10-193 (now A.R.S. §10-136), and failure to file a State Corporate Income Tax Return, A.R.S. §43-179 (now A.R.S. §43-842). Thereafter, the Trial Court dismissed the conspiracy count on the ground of duplicity and entered judgments of guilty on the remaining two counts. Petitioner was thereafter sentenced to one to three years in the Arizona State Prison on the tax count and four to five years on the false book entry count.

On appeal, the Arizona Court of Appeals, on September 11, 1980, reversed the tax count on the ground the two expert defense witnesses offered by Petitioner to rebut key State testimony were not permitted to testify, violating Petitioner's right to fundamental fairness in the trial process and remanded that count for a new trial. The false book entry count was affirmed.

On December 9, 1980, the Arizona Court of Appeals denied Petitioner's Motion for Rehearing. On December 10, 1980, Petitioner filed a Petition for review in the Arizona Supreme Court, said Petition being denied on December 23, 1980.

This Petition seeks Supreme Court review of an Arizona Rule of Criminal Procedure that mandates total disclosure of a defendant's case within twenty (20) days of arraignment, including whether the defendant himself will testify as well as the nature of the defendant's testimony. Review is sought of the sanctions provision of said Rule which was applied in this case to bar the testimony, at trial, of two key defense witnesses.

The Fifth Amendment attack was first made against the Rule on August 15, 1977 during the pre-trial motion proceeding by written motion filed and denied by the trial court. The Sixth Amendment issue was raised when the court imposed the sanction of barring two key defense witnesses from testifying because their addresses had not been furnished to the prosecution pursuant to Rule 15.7. Relevant transcript references are appended as Exhibit E. The questions were again raised on appeal and rejected by the Court of Appeals in its opinion appended hereto as Exhibit A.

ARGUMENT

I. The Arizona Defense Disclosure Statute Is In Violation Of Petitioner's Fifth Amendment Right To Be Free From Compulsory Self-Incrimination.

Arizona Rule of Criminal Procedure 15.2 mandates the broadest disclosure of the defendant's case of any such Rule this author has located in the Nation. It provides in pertinent part,

> "b. NOTICE OF DEFENSES. Within twenty (20) days after the arraignment in Superior Court, the Defendant shall provide the Prosecutor with a written notice specifying all defenses as to which he will introduce evidence at Trial, including but not limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each defense the persons, including the Defendant himself, whom he will call as witnesses at Trial in support thereof. It may be signed by either the Defendant or his counsel, and shall be filed with the Court.
>
> "c. DISCLOSURES BY DEFENDANT. Simultaneously with Notice of Defenses submitted under Rule

15.2(b), the Defendant shall make available to the Prosecutor for examination and reproduction:

> "(1) The names and addresses of all persons, other than the Defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with a particular case;
>
> "(2) The names and addresses of experts whom he will call at trial, together with the results of his physical examination and of scientific tests, experiments, or comparisons, including all written reports and statements, made by them in connection with a particular case; and
>
> "(3) A list of all papers, documents, photographs and other tangible objects which he will use at trial.

"***

"f. DISCLOSURE BY ORDER OF THE COURT. Upon motion of the Prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.2, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the Defendant's Constitutional rights, the Court, in its discretion, may order any person to make such material or information available to him. The Court may, upon request of any persons affected by the Order, vacate or modify the Order if compliance would be unreasonable or oppressive."

Rule 15.2(b) provides,

"Within twenty (20) days after the arraignment . . . the Defendant shall provide the Prosecution with a Written Notice. . . . The Notice shall specify for each defense the persons, *including the Defendant himself*, whom he calls as witnesses at the Trial in support thereof." Emphasis added.

It can hardly be imagined that a broader compulsory disclosure provision for the defendant exists anywhere in the United States. The comments to Rule 15.2 indicate that such was precisely the intent. Comment on Rule 15.2(b) provides,

> "It is intended that the 'Notice of Defenses' to be a broad disclosure of the defendant's cases, including his rebuttal of the State's case as well as his own 'Case in Chief.' It is to include all matters which he will present at trial, including those which he intends to introduce by his own testimony.
>
> "The disclosure requirement goes considerably beyond notification of affirmative defenses . . . ."

It is respectfully submitted that the Arizona Court misreads *Williams* and that the State Procedural Rule attacked herein goes far beyond anything permitted by this Court. See also *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

Petitioner finds two Fifth Amendment violations in Arizona Rule of Criminal Procedure 15. The first involves the obligation of the defendant in a criminal case within twenty (20) days from his arraignment to decide and disclose to the State whether he will testify in his own behalf, and regarding which specifically enumerated defenses he will address. A defendant in a criminal case has the right, under the Fifth Amendment, at the time his defense is being presented during his trial and not before to decide whether or not he wishes to take the witness stand in his own defense. He has the right to remain silent and not to make any prior disclosures about his future testimony, including the defenses which he might assert during such testimony. Prior compulsory disclosure violates a defendant's Fifth Amendment right against self-incrimination. Failure to disclose that the defendant will testify and to reveal the content of his

testimony, then subjects the defendant to the sanction of not being permitted to testify at the time of trial. See Rule 15.7 discussed *infra*.

Second, Petitioner challenges the validity under the Fifth Amendment of the State Procedural Rule that requires total disclosure of a defendant's case, including all witnesses and all defenses within twenty (20) days of arraignment and permits exclusion of relevant testimony as a sanction for failure to comply. The Arizona Court of Appeals finds no Fifth Amendment violation in such a Rule. Other State Appellate Courts have ruled to the contrary on similar disclosure Statutes. See *Scott* v. *State*, 519 P.2d 776 (Alaska 1974); and *Prudhomme* v. *Superior Court*, 85 Cal.Rptr. 129, 466 P.2d 673 (California 1970). The Alaska and California Supreme Courts have held that similar disclosure requirements violate the privilege against self-incrimination. The Fifth Amendment must mean the same thing in Arizona as it does in Alaska and California. This Court should accept this case and articulate how much pretrial disclosure of information by the defense is permissible under the restraints of the self-incrimination clause.

The Alaska Supreme Court in tracing the history of the Fifth Amendment, cited the distinguished Opinion of MR. JUSTICE BRADLEY speaking for the Supreme Court in *Boyd* v. *United States*, 116 U.S. 616, 631-632 (1886):

> "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books or papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an

> Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide a pure atmosphere of political liberty and personal freedom."

Rule 15.2 requires a defendant in a criminal case to tell the State the precise nature of his defense, who will testify including the defendant, and what they will say. The States have ruled differently on whether such a Rule is Constitutionally permissible under the Fifth Amendment. This Court should accept this case and resolve these conflicting State Court interpretations of the Federal Constitution.

II. Arizona Rule Of Criminal Procedure 15.7 Which Permitted The Trial Court To Exclude The Testimony Of Two "Relevant" Defense Witnesses As A Sanction For Not Providing The State With Their Addresses Deprived Petitioner Of A Fair Trial As Guaranteed By The Sixth And Fourteenth Amendments.

The Arizona Court of Appeals affirmed the lower Court's action in barring two important defense witnesses from testifying on behalf of the Plantiff concerning the false book entry count. The restriction was imposed pursuant to Rule 15.7 of the Arizona Rules of Criminal Procedure because of the Plantiff's failure to provide the addresses of the two proposed witnesses in accordance with the disclosure requirement of Rule 15.2, even though (1) Petitioner's disclosure set forth the names of the witnesses, but indicated that their addresses were unknown at the time of the disclosure; (2) Petitioner had complied with the spirit and intent of Rule 15.2 in listing JOHN C. SCHAEFER and THOMAS PIERSON as witnesses; (3) The State already knew SCHAEFER and PIERSONS' addresses; (4) The Arizona Court of Appeals acknowledged that such testimony might have been

"relevant," and (5) The State in its own Motion for Sanctions even suggested a less stringent remedy than that imposed upon this Petitioner by the Trial Court, to wit that the Petitioner comply within ten (10) days of the Court's Order to set out the witnesses and that thereafter the matter be continued for an additional thirty (30) days to allow the State to review the material (see the State's Motion for Sanctions against Defendant Fendler for inadequate disclosure filed October 6, 1977 and designated as Court of Appeals Document Number 101).

Rule 15.7 of the Arizona Rules of Criminal Procedure set out in full in the Appendix hereto reads in pertinent part as follows:

> "a. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this Rule or any Order issued pursuant thereto, the Court may impose any sanction which it finds just under the circumstances, including, but not limited to
>
> "***
>
> "(4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed . . . ."

The Arizona Rules of disclosure embodied in Rule 15.2 allows a Trial Court to bar relevant defense testimony of witnesses whose identity and addresses were known to the State before the indictment was returned. Partial exchanges between the Court and counsel for the parties, as well as offers of proof are included in the Appendix to this Petition as Exhibit E.

Petitioner respectfully submits that the sanctions imposed upon him by the Court in accordance with State Procedural Rule preventing acknowledged relevant

defense witness testimony violated Petitioner's Sixth and Fourteenth Amendment rights to due process and a fair trial. It permits a trial court judge to bar testimony offered by the defense with no inquiry into such matters as relevance, prejudice to the State or materiality.

In this case, by utilization of the State Procedural Rule, Petitioner, a defendant in a criminal case was effectively denied the right to present testimony from anyone that knew first hand facts pertaining to the false book entry count. This became particularly apparent when the State's key witness Co-Defendant, LEONARD FORMAN, was allowed to refuse to answer cross-examination questions concerning the same subject matter as a result of his exercise of his Fifth Amendment privilege.

The Arizona Court of Appeals in denying Petitioner's Sixth Amendment challenge to the Rule of Criminal Procedure holds in the broadest language that a Trial Court has the discretion unrestricted by any standards to preclude relevant testimony if a defendant in a criminal case commits a technical violation of the Rule. The Court of Appeals holds,

> "Pursuant to 17 A.R.S. Rules of Criminal Procedure, Rule 15.7, the Trial Court is authorized to impose sanctions upon a party who fails to comply with any of the provisions of Rule 15. One such sanction is the preclusion of an undisclosed witnesses' testimony. In general, the appropriate sanction for noncompliance with Rule 15 is left to the sound discretion of the Trial Court." See Court of Appeals Opinion.

The Court of Appeals permitted the sanction imposed by the Rule while at the same time noting, "Although it is unlikely that the State would have been surprised by the testimony of any of the precluded witnesses . . . ."

The United States Court of Appeals for the Ninth Circuit was asked to review the Constitutional validity of Arizona Criminal Rules 15.2 and 15.7. Although deciding the case on other grounds, the Circuit Court *in dicta* points out the problem,

> "Arizona permits imposition of sanctions on a criminal defendant for failure to comply with rules requiring notice to the Prosecution of certain defenses and the names of witnesses. See Arizona Rule of Criminal Procedure 15.7. The more extreme sanctions include striking a defense and prohibiting testimony by a defense witness or the accused himself. See Arizona Rule of Criminal Procedure 15.7(a)(4). The issue whether these sanctions can be applied for breach of Arizona Rule of Criminal Procedure 15.2 without offending the confrontation clause of the Sixth Amendment and the right to present a defense which is implicit in the Sixth Amendment is a Constitutional question of importance to the administration of criminal justice. This question was expressly reserved by the Supreme Court in *Wardius* v. *Oregon*, 412 U.S. 470, 472 n.4, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973).
>
> "***
>
> "We reiterate that imposition of the extreme sanctions contained in the Arizona Rules would present important questions of Constitutional dimensions if raised in a proper case . . . ." *Robins* v. *Cardwell*, 618 F.2d 581 (9th Cir. 1980).

Arizona's Criminal Disclosure Rule 15.2 and 15.7 must constitute the broadest in the Nation. The sanctions for failure to comply, even when no prejudice is established, are the harshest.

State Rules of Procedure should attempt to aid in the truth finding function. The Rules of Procedure challenged herein do not serve that function. Rather they

provided the vehicle wherein the truth may be suppressed. Such is not the purpose of the criminal justice system. Such a rule does not comport with the demands of the Sixth and Fourteenth Amendments. This Honorable Court should address this important Constitutional question.

CONCLUSION

For the reasons as stated herein, it is respectfully requested that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ THOMAS E. HORN
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240 Stockton Street
Tenth Floor
San Francisco, California 94108
(415) 981-2534

Attorney for Petitioner,
Robert H. Fendler

EXHIBIT A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CR 3376
1 CA-CR 3748
(Consolidated)

STATE OF ARIZONA, *Appellee,*

v.

ROBERT H. FENDLER, *Appellant.*

OPINION

An Appeal from the Superior Court of Maricopa County
Cause No. CR-96776 SGJ
The Honorable Charles L. Hardy, Judge
AFFIRMED IN PART; REVERSED IN PART

Robert K. Corbin, Attorney General
By William J. Schafer III, Chief Counsel, Criminal Division
Philip J. MacDonnell, Director, Special Prosecutions Division
Michael C. Cudahy, Assistant Attorney General
Samuel P. Goddard III, Former Assistant Attorney General

Attorneys for Appellee — Phoenix

Southern & Mulhall
By E. Reid Southern — Phoenix

and

Thomas Horn — San Francisco, CA.
Attorneys for Appellant

WREN, Vice Chief Judge

On March 7, 1977, Robert H. Fendler (appellant), James R. Holman and Leonard H. Foreman were charged in a seventeen count indictment with criminal conduct in connection with the operation of several financial institutions headquartered in Phoenix, Arizona. The firms involved included

the Lincoln and American Thrift Associations and the American Bank of Commerce. On October 13, 1977, co-defendant, Leonard Foreman, entered into a plea agreement with the state and plead guilty to the charge of conspiracy. (Count One). The trial subsequently commenced on October 17, 1977, and continued through February 27, 1978, at which time the jury found appellant guilty of conspiracy, A.R.S. §13-331 (now A.R.S. §13-1003), false book entry, A.R.S. §10-193 (now A.R.S. §10-136), and failure to file a state corporate income tax return. A.R.S. §43-179 (now A.R.S. §43-842). On April 14, 1978, the trial court dismissed the conspiracy count on the basis of duplicity and thereafter entered judgments of guilt on each of the remaining two counts. Appellant was sentenced to serve not less than one nor more than three years on the failure to file count, and not less than four nor more than five years on the false book entry count.

Appellant filed his notice of appeal from the entry of judgment on April 24, 1978. (1 CA-CR 3376). On June 13, 1978, appellant filed a motion to vacate judgment pursuant to Rule 24.2, Arizona Rules of Criminal Procedure, 17 A.R.S. The motion was denied on September 28, 1978. Appellant thereafter filed an untimely notice of appeal from the order denying his motion to vacate. (1 CA-CR 3748). However, this Court suspended the filing requirements and the appeals were subsequently consolidated.

Since the appellant raises a substantial number of issues in his two appeals, we have set forth the necessary facts in the discussion of each individual question.

Challenge To The Grand Jury

Appellant contends that the state grand jury was not impaneled according to law because prospective grand jurors were excused from service by the state grand jury commissioner (Commissioner).[1] Appellant asserts that the Commis-

[1] The jury commissioner from the county in which the "Assignment Judge" sits acts as the state grand jury commissioner for the purpose of assisting in the impanelment of the state grand jury. A.R.S. §21-423(B), Rule 12.22(C), Arizona Rules of Criminal Procedure, 17 A.R.S.

sioner had no authority to unilaterally excuse prospective state grand jurors, or, in the alternative, if she (Commissioner) was vested with some discretionary authority, such discretion was abused under the facts of the present case. He further asserts that the indictment should have been dismissed because the excusals materially altered the composition of the grand jury and eliminated its statewide character.

The impanelment of state grand juries is regulated by statute and the Arizona Rules of Criminal Procedure. A.R.S. §21-421 *et. seq.,* Rule 12, Arizona Rules of Criminal Procedure, 17 A.R.S. The selection and preparation of state grand jurors is specifically governed by Rule 12.22, Arizona Rules of Criminal Procedure, 17 A.R.S., which divides the process into three distinct steps.

The first step is governed by Rule 12.22(B) which is designed to establish the initial pool of prospective state grand jurors:

> *Assistance.* . . . Upon direction of the Assignment Judge, the jury commissioners of the respective counties shall submit to the Assignment Judge, within such time as he may direct, a specified number of prospective State grand jurors selected at random from their qualified jury boxes, wheels or rosters (otherwise known as current jury lists). . . .

The next step is governed by Rule 12.22(C) which provides that:

> The Assignment Judge shall cause a questionnaire to be sent to each prospective State grand juror. Following return of such questionnaires, the jury commissioner of the county in which the Assignment Judge is serving shall select at random from those responding prospective State grand jurors, *who are qualified and not excused,* a number of prospective State grand jurors sufficient for final selection of State grand jurors; and this number shall be summoned to appear before the assignment judge for such final selection. (emphasis supplied.)

Appellant argues that the Commissioner's only function pursuant to Rule 12.22(C) is to make a random selection from those prospective grand jurors who respond to the questionnaire, since the county jury commissioners have already completed the qualification and excusal process by the time the names are submitted to the "Assignment Judge." We do not agree.

Rule 12.22(B) does not authorize the county jury commissioners to screen prospective candidates for the *state* grand jury. Their sole function is to forward a specified number of randomly selected names from their "current jury lists."[2]

On the other hand, we believe that Rule 12.22(C) contemplates that the initial qualification and excusal of prospective *state* grand jurors is to be undertaken by the Commissioner.[3] Consequently, we hold that the Commissioner possessed the necessary authority to excuse those prospective

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[2] The persons' names who appear on the "current jury lists" have already qualified and not been excused from *county* jury service. A.R.S. §§21-315, 21-321. We can find nothing explicit or implicit in the language of Rule 12.22(B) which authorizes the county jury commissioners to screen candidates for the *state* grand jury. Furthermore, we believe that the language in Rule 12.22(C) is dispositive of the issue.

[3] Our conclusion rests upon the interrelationship of several factors. First, the use of new questionnaires is typical of the process used in Arizona to qualify and excuse persons from jury service. *See* A.R.S. §21-314. Moreover, the requirement that the Commissioner randomly select a number sufficient for final selection from those responding prospective state grand jurors is expressly qualified by the phrase "who are qualified and not excused", which, we interpret, when read in conjunction with the questionnaire requirement, as authorizing the Commissioner to engage in the qualification and excusal process. We are also convinced that it is eminently more practical for the Commissioner to engage in these activities because he or she is charged with the responsibility of coordinating the selection process and will generally have a better perspective of the specific needs of a particular state grand jury.

grand jurors who in her opinion were incapable of serving without "undue hardship."[4]

The office of "jury commissioner" was established to assist the courts with the jury selection process and to insulate judges from having to consider every request for excusal. A.R.S. §21-131, *See United States* v. *Flynn,* 216 F.2d 354 (2nd Cir. 1954). To achieve these objectives, the jury commissioners were given a broad measure of unilateral discretion in determining whether a prospective juror should be excused from service. A.R.S. §21-315, *See United States* v. *Gurney,* 393 F.Supp. 688 (1974); *United States* v. *Coppola,* 296 F.Supp. 903 (1969).[5] While it is true, in the instant case, that the Commissioner was not provided with judicial guidelines regarding the grounds for excusal from *state* grand jury service, she was guided by the statutory standard of "undue hardship", and the local superior court guidelines concerning the various grounds upon which a person could be excused from county jury service.

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[4] A.R.S. §21-202 provides: "The following persons shall, upon their timely application to the court, be excused from service as a juror: . . . 2) Any person upon whom service as a juror would, in the judgment of the court impose an *undue hardship.*" (emphasis supplied) While the above statute refers to judicial excusals and Rule 12.22(C) makes no specific reference to the statutory standard of undue hardship, we believe that the standard is implicit in the Rule by virtue of Rule 12.22(A), A.R.S. §21-422 and A.R.S. §21-315.

[5] We recognize that A.R.S. §21-315 was enacted prior to the creation of the state grand jury and concerns the jury commissioner's discretionary authority to excuse persons from *county* jury service. However, A.R.S. §21-422(A) provides that "the law applicable to county grand juries . . . shall apply to the state grand juries except insofar as it is in conflict with the article." Since there is no language in A.R.S. §21-422 *et. seq.* or Rule 12, Arizona Rules of Criminal Procedure, regarding the extent of the Commissioner's discretionary authority, we hold that the Commissioner possesses the same degree as he or she would possess in determining whether a person should be excused from county jury service.

While the record reflects that the Commissioner deviated from the county guidelines in particular instances, we find no abuse of discretion.

However, even if we determined that certain jurors were erroneously excused, appellant would be confronted by the rule that a conviction will not be reversed for error in the selection of the grand jury unless the defendant is able to show *actual prejudice.*[6] *State* v. *Webb,* 101 Ariz. 307, 419 P.2d 91 (1966). Appellant's only argument along these lines is that the Commissioner's action resulted in a geographically imbalanced panel comprised of 15 Maricopa County residents and one resident from Graham County. *See* A.R.S. §21-423(A). This fact alone fails to even make out a prima facie showing of "actual prejudice" since a defendant is not entitled to be tried or investigated by any particular juror or jurors from separate geographical areas. *See State* v. *Webb.* "If the jurors who actually serve are impartial and fair, the fact that the other impartial jurors are erroneously excused is not reversible error."[7] *State* v. *Webb,* 101 Ariz. at 309, 419 P.2d at 93.

Tax Count

Appellant next contends that his conviction for failure to file a 1974 state corporate income tax return on behalf of American Thrift Association (American Thrift) was improper and therefore must be reversed.

Appellant was convicted of violating A.R.S. §43-179(f) (now A.R.S. §43-842) which provides that:

> Any person who, within the time required by or under the provisions of this title, willfully fails to file any return

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[6] While we realize that *State* v. *Webb* concerned excusals by the court, we hold that the doctrine of "actual prejudice" extends to excusals by a jury commissioner.

[7] The appellant has made no attempt in this appeal to establish that the grand jurors who returned the indictment acted unfairly.

or to supply any information with intent to evade any tax imposed by this title, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison not to exceed five years, or by fine of not more than five thousand dollars, or by both such fine and imprisonment, at the discretion of the court.[8]

Appellant initially claims that the indictment was defective because it failed to specify his corporate relationship with American Thrift and to set forth his duty to perform the act in respect of which the violation occurred.[9] The state responds by arguing that the issue was not raised in a timely manner and therefore is waived for purposes of appeal. Rules 13.5(c), 16.1(c), Arizona Rules of Criminal Procedure, 17 A.R.S. We agree. After reviewing the record, we find that the appellant failed to specifically raise the issue in accordance with the requirements of Rule 16.1(b),[10] which now precludes him from

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[8] "Person" is defined as including "individuals, fiduciaries, partnerships, and corporations" A.R.S. §43-101(h). (now A.R.S. §43-104(20)).

"Corporation. 'Corporation' shall mean and include all corporations, joint stock companies, banks, insurance companies, business trusts or so-called 'Massachusetts trusts', investment companies, building and loan associations, and other associations whether incorporated or unincorporated." A.R.S. §43-101(j). (now A.R.S. §43-104(3)).

[9] Count 12 of the indictment provides that:

"On or about the 15th day of April, 1975, in the County of Maricopa, State of Arizona, ROBERT H. FENDLER and JAMES R. HOLMAN did, within the time required by or under the provisions of Title 43 of the Arizona Revised Statutes, willfully fail to file a return or to supply information, to wit: an Arizona State Corporate Income Tax Return for AMERICAN THRIFT ASSOCIATION (an Arizona corporation) for the taxable year ended December 31, 1974; with intent to evade a tax imposed by Title 43 of the Arizona Revised Statutes, all in violation of Arizona Revised Statutes §43-141 (as amended), §43-179; §13-138, §13-139 and §13-140."

[10] Rule 16.1(b) provides:

"Making of Motions Before Trial. All motions specified in the omnibus hearing form shall be made at or before an om-

asserting the issue on appeal. Rules 13.5(c) and 16.1(c), *State* v. *Puryear,* 121 Ariz. 359, 590 P.2d 475 (App. 1979).

He next urges that the tax conviction must fall because American Thrift was not obligated to file a return for the taxable period ending December 31, 1974. The resolution of this issue revolves around the construction of certain language found in A.R.S. §43-141(b)(1) (now A.R.S. §43-307) which provides that:

> Every corporation *subject to the tax imposed by this article* shall make a return to the tax commission. . . . (emphasis supplied.)

Appellant asserts that the underscored language should be interpreted as meaning that a corporation's duty to file is dependent upon whether state taxes are actually due and owing. We do not agree.

While our appellate courts have never been called upon to interpret the language in question, the Department of Revenue, which is charged with the responsibility of prescribing rules and regulations for the enforcement of the act (A.R.S. §43-175(C)) (now A.R.S. §43-223), has construed the language to mean that "every corporation *not expressly exempt* from tax must make a return of income, regardless of the amount of its net income." A.C.C.R. R15-2-141(b)-1(a) (1954). (emphasis supplied.)[11] *Also see* A.C.C.R. R15-2-141(b)-1(b) (1954). While we are not bound by ad-

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nibus hearing. Any other motion, defense, objection or request which is capable of determination without the trial of the general issue shall, whenever possible, be made at or before an omnibus hearing, but, in any event, no later than 20 days prior to the date set for trial. Lack of jurisdiction may be raised at any time."

[11] No claim has been made that American Thrift was exempt from taxation. *See* A.R.S. §43-147 (Now A.R.S. §43-1201). Moreover, we interpret the quoted language as requiring a corporation to file a return even if it shows a loss for the taxable period in question.

ministrative interpretation, "where long continued and in cases of ambiguity we will acquiesce therein." *City of Mesa* v. *Killingsworth,* 96 Ariz. 290, 296, 394 P.2d 410, 414 (1964); *Also see Long* v. *Dick,* 87 Ariz. 25, 347 P.2d 581 (1959); 80 A.L.R.2d 949 (1961).[12]

Appellant's additional contention that American Thrift was relieved of its responsibility to file a return because it ceased to exist as the result of a tax free reorganization is also without merit. The regulations clearly state that if a corporation exists during any portion of a taxable year, it is "required to make a return for that fractional part of a year during which it was in existence."[13] *Also see* A.C.C.R. R15-2-152(g)-c.

Appellant next contends that in order to sustain a conviction under A.R.S. §43-179(f), (now A.R.S. §43-842), the state needed to prove that: a) appellant had a duty to file American Thrift's 1974 corporate income tax return b) American Thrift's failure to file the return was the result of appellant's intentional conduct c) American Thrift incurred actual tax liability for the year 1974, and d) appellant acted with the intent to evade the payment of taxes actually due and owing. We are not in complete agreement.

In our opinion, in order to establish a violation of the above section, the state must prove beyond a reasonable doubt that the defendant: 1) was legally obligated to file the return 2) willfully failed to file the return, and 3) acted with the intent to evade the payment of state income tax.

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[12] We also note that appellant has proffered no authority or reasoning which would justify a contrary conclusion.

[13] A.C.C.R. R15-2-141(b)-1(b)(1954) states, in pertinent part:

"(b) *A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of a year during which it was in existence.*" (emphasis supplied.)

As for the first element, there appears to be no dispute, and the record supports the conclusion that appellant, as general manager of American Thrift, was obligated to file a return on behalf of American Thrift. *See* A.R.S. §43-141(b)(2). (now A.R.S. §43-307).

In establishing the second element of the offense the state bore the burden of proving that appellant "willfully" failed to file American Thrift's 1974 state corporate income tax return. While our courts have never passed upon the meaning of the word "willfully" as used in the context of our tax statutes, the United States Supreme Court has interpreted the word as meaning an intentional violation of a known legal duty. *United States* v. *Bishop,* 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 94 (1973).[14]

As a consequence, the failure to file must be intentional and deliberate rather than due to negligence, carelessness, or good faith mistake. *United States* v. *Farris,* 517 F.2d 226 (7th Cir.), *cert. denied,* 423 U.S. 892, 96 S.Ct. 189, 46 L.Ed.2d 123 (1975). Thus, in order to convict, the jury must find that the defendant intentionally and deliberately failed to file the required return knowing that he was legally obliged to do so. *United States* v. *McCorkle,* 511 F.2d 482 (7th Cir.), *cert. denied,* 423 U.S. 826, 96 S.Ct. 43, 46 L.Ed.2d 43 (1975).

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[14] A.R.S. §1-215(36) provides that:

"In the statutes and laws of this state, unless the context otherwise requires:

> 'Wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or injure another or to acquire any advantage."

However, since our tax statutes are basically adopted from federal law, we will give great weight to the interpretations given similar statutes by federal authorities. Because we believe that the context requires otherwise we hold that the statutory definition is inapplicable in the present case.

Again we believe that the evidence was more than sufficient for the jury to conclude that appellant acted "willfully" in failing to file the American Thrift return.

A review of the record indicates that appellant admitted that he was an attorney and a tax specialist. This fact alone would permit the inference that appellant knew of his duty to file the return. *United States* v. *Cirillo,* 251 F.2d 638, 639 (3rd Cir. 1957), *cert. denied,* 356 U.S. 949, 78 S.Ct. 914, 2 L.Ed.2d 843 (1958), *Leet* v. *State,* 203 Md. 285, 100 A.2d 789 (App. 1953). The evidence further discloses that he (appellant) had an intimate working knowledge of American Thrift's business affairs which is another factor implying knowledge of his duty to file. *Lumetta* v. *United States,* 362 F.2d 644 (8th Cir. 1966).

Finally, corporate returns were filed by American Thrift for the years 1970, 1971 and 1972, years in which no state tax was due and owing, each of which were signed by appellant in his capacity as general manager. These previous filings are also indicative of appellant's awareness of his obligation to file, despite the fact that no taxes were due. *United States* v. *McCabe,* 416 F.2d 957 (7th Cir. 1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed.2d 752 (1970), *United States* v. *Garguilo,* 554 F.2d 59 (2nd Cir. 1977); *United States* v. *Lumetta.*

The final element the state had to prove was that the appellant acted with an *intent to evade* the payment of state income taxes. It is here that appellant purportedly finds support for his claim that the trial court erred when it ruled that the state did not have to prove that appellant acted with an intent to evade the payment of state income taxes *actually due and owing.* However, appellant's entire argument rests upon the assumption that the phrase "intent to evade" found in A.R.S. §43-179(f) (now A.R.S. §43-842) is the functional equivalent of the phrase "attempt to evade" found in 26 U.S.C. §7201, the federal tax evasion statute, which has been construed as requiring proof that a tax is due. *United States* v. *Garber,* 607 F.2d 92 (5th Cir. 1979).

The cardinal rule of statutory construction is to give effect to the legislature's intent. *State ex rel. Flournoy* v. *Mangum,* 113 Ariz. 151, 548 P.2d 1148 (1976). In ascertaining that intent, we look to the words, context, subject matter, effects and consequences, reason and the spirit of the law. *State ex rel. Flournoy* v. *Mangum; State* v. *Schoner,* 121 Ariz. 528, 591 P.2d 1305 (App. 1979). Furthermore, the words of the statute should be given their plain and ordinary meaning, unless it appears from the context that a different meaning should control. *State* v. *Schoner, State* v. *Arthur,* _____ Ariz. _____, 608 P.2d 90 (1980). While we acknowledge that A.R.S. §43-179(f) (now A.R.S. §43-842) is a hybrid version of several different federal tax statutes, *See* 26 U.S.C. §§7203, 7207, the thrust of the offense concerns a willful failure to file a return rather than an attempt to evade the payment of taxes actually due and owing. As a result, we believe that the most sensible construction would be to find that the intent element is satisfied upon a showing that the defendant acted with the requisite intent at the time of the alleged violation, regardless of whether taxes were actually due. A review of evidence leads us to believe that the state sufficiently met its burden.

Appellant next argues that the trial court erred when it precluded his expert witnesses from controverting material matters testified to by the state's expert witnesses.

The state was permitted, in its case-in-chief, to produce several expert witnesses who testified that American Thrift had not been involved in a tax-free reorganization in 1974.[15] As a consequence, they concluded that American Thrift had incurred substantial tax liability, as the result of the sale of its assets to Lincoln Thrift.[16] One of the state's experts also

[15] In essence, the state's experts testified that the sale of American Thrift's assets to Lincoln Thrift Association (Lincoln Thrift) and the subsequent purported merger of American Thrift into the American Bank of Commerce did not qualify as an integrated tax-free reorganization under 26 U.S.C. §368(1)(A)(F).

[16] No objection was made to the introduction of this testimony apparently because appellant believed that the state was attempting to meet its burden of proving that a tax was due and owing.

testified to the effect that even if American Thrift had merged with the American Bank of Commerce, that it (American Thrift) still would have been responsible for filing a return for that part of the taxable year during which it was in existence.[17] However, when appellant attempted in his case-in-chief, to rebut the evidence with his own expert testimony, the trial court sustained the state's objection ruling that it would not allow the witnesses to lecture the jury on the law of the case.[18]

The court further denied appellant's subsequent motion to strike.[19] While the admission of expert testimony falls largely within the sound discretion of the trial court, *State* v. *Dickey,* _____ Ariz. _____, 608 P.2d 302 (1980), *State* v. *Fierro,* 124 Ariz. 182, 603 P.2d 74 (1979), if the state endeavors to establish criminal liability by way of expert testimony then the defense is entitled, as a matter of fundamental fairness, to use its own expert testimony. *United States* v. *Caserta,* 199 F.2d 905 (3rd Cir. 1952), 35 Am.Jur.2d, Federal Tax Enforcement, §151. Moreover, while we agree with the trial court's conclusion that it was improper

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[17] Again, no objection was tendered because appellant intended to rebut the conclusion with his own expert's testimony that American Thrift was not "subject to" state corporate income taxes in 1974.

[18] Appellant's offer of proof indicated that his expert witnesses would testify that based upon their interpretation of statutes, revenue rulings and case law that 1) American Thrift had been involved in a tax-free reorganization under federal law and 2) American Thrift was not obligated to file a return as a result of the reorganization. In sustaining the state's objection, the trial court reasoned that the testimony concerned only questions of law, which fell within the special province of the court, and not the witnesses.

[19] The gist of appellant's motion was that the court should strike all of the state's expert testimony relating to American Thrift's tax responsibilities for 1974, since the defense was precluded from rebutting it with its own expert witnesses.

for the defense witnesses to lecture the jury on the law of the case, the prospective testimony was clearly admissible for the limited purpose of lending credence to appellant's assertion that he never *intended* to evade the payment of taxes because his research led him to believe otherwise. The mere fact that appellant was allowed to testify concerning his reasons for failing to file American Thrift's return did not cure this error. Since appellant's conviction on the tax count (Count Twelve) must be reversed and remanded for a new trial, we do not believe that it is necessary to address the remaining issues raised by appellant in respect to that count.

False Book Entry

Appellant contends that the false book entry count (Count Three) was defective on the issue of appellant's intent to defraud. He asserts that "in the indictment an 'intent to defraud' also includes an intent to 'destroy', 'alter' and an 'intent to mulilate [sic] or falsify.'" But that under the terminology of the indictment there is no requirement that the acts of "making or concurring in the making of false entries or omissions" be done with *any* intent at all. The indictment thus makes the act of false book entry a crime of strict liability. He further alleges that he preserved the issue for purposes of appeal. We do not agree. We have reviewed the record and find that appellant did not raise this issue within the time provisions set forth in Rule 16.1(b), Arizona Rules of Criminal Procedure, 17 A.R.S. As a result, it is waived for purposes of appeal. Rules 13.5(c), 16.1(c), Arizona Rules of Criminal Procedure, 17 A.R.S.

Appellant further contends that the trial court's jury instruction on Count Three was also defective on the issue of appellant's intent to defraud.

The jury was instructed that they had to find beyond a reasonable doubt that the entries were made with an "intent to defraud." "Intent to defraud" was subsequently defined as an "intent to deceive *another person.*" (emphasis supplied.) Appellant contends that A.R.S. §10-193(A)(2) (Repealed Laws

1975, Ch. 69 §7, effective . ly 1, 1976) specifies that the "intent to defraud" must be directed toward the corporation itself, rather than just "another person."[20] We do not agree. There is nothing in the statute which indicates towards whom the "intent to defraud" must be directed. Moreover, appellant's construction does violence to the general aim of these statutes which is to insure that persons who inspect the books will receive a true and accurate description of the particular entity's condition. *United States* v. *Darby,* 289 U.S. 224, 53 S.Ct. 573, 77 L.Ed. 1137 (1933). Based upon the foregoing, we find no error.

Appellant next claims that the state failed to prove that the 74-1 journal entries were "false" within the meaning of A.R.S. §10-193(A)(2).[21]

The evidence adduced at the trial established that Lincoln Thrift had adopted a double entry accounting system. In its most simplified form this meant that each entry into its general ledger was supported by an external document with a designated journal entry number. In essence, the external document acted as the source of original entry into the general ledger. In accordance with the appellant's instructions, Leonard Foreman prepared adjusting journal entry 74-1 to record the acquisition of American Thrift's offices and accounts. However, in order for the credit and debit entries to balance, and therefore show that Lincoln Thrift had received value for the acquisitions, appellant directed Foreman to capitalize certain expenses which were thereafter entered in the

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[20] A.R.S. §10-193(A)(2) provided that:

"A. It is unlawful for a director, officer or agent of a corporation or association to: . . .

2. Defraud, destroy, alter, mutilate or falsify any books, papers, writings or securities belonging to such corporation or association, or make, or concur in making, any false entries or omit or concur in omitting to make any material entry, in a book of accounts or other record or document kept by the corporation or association, with intent to defraud."

[21] See footnote 20.

debit (asset) column of the entry. On June 30, 1974, the entries were posted in Lincoln Thrift's general ledger with the corresponding designation of 74-1.

Appellant initially argues that the state's expert witnesses only established that the entries in question were not in accordance with generally accepted accounting standards, not that the entries were "false".[22] We do not agree.

While much of the expert's testimony was couched in terms of generally accepted accounting principles, the entire tenor of their testimony was to the effect that certain of the entries had no basis in fact as well as in theory.

Appellant also directs our attention to the following colloquy between his counsel and Leonard Foreman, which he contends conclusively established that the entries were not "false" within the meaning of A.R.S. §10-193(A)(2).

> [By appellant's counsel]
>
> Q. . . . After making the adjusting entries [74-1] to the books of Lincoln Thrift Association, did the Lincoln Thrift Association books reflect the total cost to Lincoln Thrift of the transactions with American Thrift?
>
> A. Yes.

In support of this argument, he cites the cases of *State* v. *Heron,* 94 Ariz. 81, 381 P.2d 764 (1963) and *State* v. *Grow,* 93 Idaho 588, 468 P.2d 320 (1970). In *Heron,* with which this Court is particularly familiar, the indictment charged the defendant with having made a "false" deposit entry because "in truth or fact said [sum] was never deposited" 94 Ariz. at 85, 381 P.2d at 767. While the state conceded that the deposit had been actually made, it nevertheless contended that a true and correct entry made with a fradulent intent constituted a "false" entry under the statute. (A.R.S. §10-193(A)(2)). After

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[22] The state specifically alleged that the following intangible asset categories were "false": 1) goodwill 2) acquisitions and retention 3) branch offices 4) investment securities.

an extensive review of the case law in the area, the Supreme Court rejected the state's position, reasoning that "a recital on the books which speaks the truth cannot be a 'false' entry." 94 Ariz. at 85, 381 P.2d at 767.[23]

In our opinion, *Heron* is factually distinguishable simply because the accuracy of certain 74-1 entries was at issue from the commencement of this case. In *United States* v. *Darby,* 289 U.S. at 225, 53 S.Ct. at 574, 77 L.Ed. at 1138, cited with approval in *Heron,* the United States Supreme Court observed that:

> The crime of making false entries by an officer of a national bank with the intent to defraud . . . includes any entry on the books of the bank which is *intentionally made to represent what is not true or does not exist,* . . . (citation omitted). . . . To read the statute otherwise is to be forgetful of its aim. Its aim was to give assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition. (citation omitted.) (emphasis supplied.)

While the 74-1 entries, taken as a whole, may reflect appellant's personal analysis of the "costs"[24] involved in acquiring American Thrift's offices and accounts, the evidence overwhelmingly supports the jury's conclusion that certain of the entries represented assets which simply did not exist. Consequently, we find appellant's argument to be without merit.

Appellant further contends that the trial court erroneously stated that a "failure to comply with generally accepted accounting principles" was an element of the crime of "false book entry" under A.R.S. §10-193(A)(2). In support of his claim appellant refers this Court to the Reporter's Transcript dated February 1, 1978, at page 45. The citation fails to sup-

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[23] We have reviewed the *Grow* decision and find that we need not address it since it is factually distinguishable from the present case.

[24] "Costs" meaning the debit (asset) and credit (liability) entries reflected in adjusting journal entry 74-1.

port appellant's assertion.[25] We have also reviewed the jury instruction on Count Three and find that no mention was made of generally accepted accounting principles.

Appellant next contends that the trial court prevented him from developing a main theory of his defense by precluding him from testifying on various subjects which were allegedly related to his "intent" at the time he formulated the entries (74-1) in question.

We begin our analysis premised on the fundamental principle that the relevance and admissability of offered evidence lies within the sound discretion of the trial court and such discretion will not be disturbed on appeal absent a showing that it was clearly abused. *State* v. *Tulipane,* 122 Ariz. 557, 596 P.2d 695 (1979); *State* v. *Mosley,* 119 Ariz. 393, 581 P.2d 238 (1978).

In support of his claim of error on the issue of intent appellant first asserts that the trial court erroneously precluded him from testifying as to his "state of mind" leading up to the formation of the American Bank of Commerce because it was in fact relevant to the 74-1 entries. A review of the record discloses that during the argument following the state's objection to such testimony that appellant's counsel never once claimed that the evidence was relevant to the "false book entry" charge. Having failed to offer the evidence for the purpose suggested in this appeal, appellant cannot now predicate error based upon its exclusion. *Ross* v. *State,* 23 Ariz. 302, 203 P. 552 (1922).

Appellant next contends that he was precluded from testifying that he had relied upon legal research to support the journal entries (74-1). Again the record does not support appellant's claim, because he in fact testified on several occasions that he had done legal research and that each and every

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[25] The statement we are referred to was made outside the presence of the jury in reference to an element of a different offense.

entry was supported by relevant tax law. We note that the trial court did prevent appellant from discussing the contents and holdings of particular cases on the basis that it was inappropriate for the witness to lecture the jury on the law of the case. We find no error.

Appellant further questions the trial court's ruling prohibiting him from testifying that he had relied on industry practices in formulating the accounting entries (74-1). The record discloses that appellant was asked if he had depended upon any other source of information to justify the journal entries. He (appellant) answered that he had relied on what other banks and saving and loan associations had done in the area. The state's relevancy objection was sustained. However, no motion to strike was tendered, consequently, even if the court erred, it was harmless since the answer remained in the record.[26] *Greene* v. *Hereford,* 12 Ariz. 85, 95 P. 105 (1908); *Ross* v. *State; State* v. *Abbey,* 13 Ariz.App. 55, 474 P.2d 62 (1970).

Appellant was also precluded from testifying about the actual accounting practices of other financial institutions and how his method of operation had purportedly conformed to what the others had done. He argues that industry "custom and usage" are relevant to a "state of mind" defense and therefore the testimony was erroneously excluded.[27] While we are not prepared to say that such evidence could never be pro-

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[26] We have also reviewed the court's jury instruction on the subject of objections. The jury was informed that a witness will sometimes answer a question before an objection is interposed, if the court sustained the objection, that it would then have to rule on a motion to strike, and if it granted the motion, that it would inform them (jury) to disregard the answer. Since the jury was not so informed we find nothing in conflict with the above cited rule.

[27] The case of *Lingenfelter* v. *Title Insurance Company of Minnesota,* 442 F.Supp. 981 (1977), cited by appellant in support of his position, is clearly distinguishable not only on its facts but also on the law of the case.

bative of a person's intent, appellant's assignment must fail for lack of an adequate offer of proof. At no time did appellant proffer to the court what he intended to introduce by way of specific testimony or otherwise. His counsel's repeated references to "state of mind" failed to sufficiently place the trial court in a position of being able to determine whether the proposed evidence was in any way probative of appellant's "intent" at the time he formulated the entries. Absent such specification, appellant cannot claim error on appeal.

We have also reviewed appellant's complaints concerning other evidentiary rulings on the question of "intent" and find them unsupported by the record and therefore without merit.

Appellant next contends that the trial court erred in refusing to give an instruction on the defense of advice of counsel. While there appears to be no Arizona case law on the subject, the general rule is that in order to be entitled to such an instruction the defendant must introduce evidence which shows that: 1) he placed all the relevant facts known to him before his counsel 2) counsel rendered an opinion on the propriety of a *particular* course of action 3) he believed that the opinion was rendered in good faith, and 4) in reasonable reliance upon that opinion he engaged in a course of action which corresponded with his counsel's opinion. *United States* v. *Danser,* 26 F.R.D. 580, 587 (1959), *affirmed,* 281 F.2d 492 (1st Cir. 1960), *Also see Bursten* v. *United States,* 395 F.2d 976 (5th Cir. 1968), *cert. denied,* 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972).

While it is a fundamental principle of law that a defendant is entitled to an instruction on a defensive theory for which there is any foundation in the evidence, *State* v. *Melendez,* 121 Ariz. 1, 588 P.2d 294 (1978); *State* v. *Gamble,* 111 Ariz. 25, 523 P.2d 53 (1974); there was no evidence presented at trial that appellant or anyone else ever consulted attorney David M. West or any other counsel concerning the propriety of the entries associated with adjusting journal entry 74-1. While Mr. West did testify that he advised appellant as early as 1972 that the Thrift companies were not required to

use generally accepted accounting principles, "in maintaining their books and records or in preparing, [or] filing the reports required by law," on cross-examination, he admitted that he had not been consulted concerning the preparation of Lincoln Thrift financial statements nor had he reviewed the books and records before the financial statements were prepared prior to *October, 1975*. Absent any evidence that Fendler received advice of counsel concerning the 74-1 entries, the trial court acted properly in refusing to give the requested instruction.

Appellant further contends that his false book entry conviction must be reversed because the trial court's post-verdict dismissal of the conspiracy count (Count One) raised the distinct possibility that his conviction rested on an impermissible ground (i.e. the conspiracy count). *Grunewald* v. *United States,* 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). We do not agree.

The jury was given an extensive instruction on conspiracy. As noted earlier, the jury subsequently found appellant guilty of conspiracy (Count One), false book entry (Count Three) and failure to file a state corporate income tax return (Count Twelve).[28] Prior to entering judgment, the trial judge dismissed the conspiracy count because he had determined that it was fatally defective.[29] Appellant now argues that he must be granted a new trial because it is impossible to determine whether his conviction for false book entry rested on the false book entry instruction or on the following portion of the conspiracy instruction:

> (d) The crime of conspiracy is a separate and distinct offense from the crime or crimes which may have been the

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[28] Holman was acquitted of the "false book entry" charge.

[29] The trial court determined that Count One was bad for duplicity, in other words, it charged multiple offenses in a single count, which violated the requirement that separate offenses be set forth in separate counts. *See* Rule 13.3, Arizona Rules of Criminal Procedure, 17 A.R.S. The trial court's order has been appealed by the state. *See State* v. *Fendler,* 1 CA-CR 3400, filed Sept. 11, 1980.

> object or objects of the conspiracy. A co-conspirator committing a crime pursuant to conspiracy is held to be the agent of other conspirators. . . . Even though he did not participate in the acts constituting the crime of false book entry, either Mr. Fendler or Mr. Holman could be found guilty of that offense if you are satisfied beyond a reasonable doubt:
>
> 1. That the essential elements of false book entry have been established,
>
> 2. False book entry was committed pursuant to a conspiracy.
>
> 3. Mr. Fendler or Mr. Holman was a member of the conspiracy at the time that false book entry was committed.

It is inconceivable to this tribunal, based upon the record before us, that the jury could have predicated its verdict on the false book entry charge solely, if at all, upon the defective conspiracy count. Appellant never disputed the fact that he formulated the 74-1 entries and directed their placement on the Lincoln Thrift books. Rather, appellant tried to escape liability by attempting to establish the accuracy of the entries and his lack of intent to defraud. However, the evidence adduced at trial clearly permitted the jury to find to the contrary. In our opinion, there is no possible chance that the jury could have found that the "essential elements" of false book entry were established without also finding that appellant was the culpable party. We find no error.

Prosecutorial Misconduct

Appellant next argues that the trial court erred by denying his motion to dismiss the indictment because of Leonard Foreman's alleged perjury before the state grand jury.

On February 8, 1977, Leonard Foreman testified before the state grand jury concerning appellant's alleged deletion of footnotes from the December 31, 1974 financial statement of Lincoln Thrift Association (Financial Statement) which was filed with the Arizona Corporation Commission (Commission)

in April of 1975. The testimony, in pertinent part is as follows:

Q. After you prepared Exhibit No. 28, the statements of financial condition for Lincoln Thrift Association as of December 31, 1974, what did you do with it?

A. I gave it to Mr. Fendler.

Q. At the time that you gave the statement of financial condition, which is Exhibit No. 28, to Mr. Fendler, was Mr. Fendler fully aware that approximately $1,500,000 of fictitious assets were represented on that?

A. Yes, sir.

* * *

Q. Mr. Foreman, I am now going to give you what has been marked Exhibit No. 29 and ask you if you recognize that?

A. Yes, sir.

Q. Would you tell the Grand Jury what that is, please?

A. Lincoln Thrift Association notes to the financial statements, December 31, 1974.

Q. Did you prepare the original of that document?

A. Yes sir, I did.

Q. Exhibit No. 29 is a photocopy. To the best of your knowledge, does it appear to you to be a true and correct copy of the original which you prepared?

A. Yes, sir.

Q. Were those notes an integral part of the 12-31-74 Lincoln Thrift financial statement; were they to be?

A. They were to be, yes, sir.

Q. Were they in fact part of the financial statement?

A. No, sir.

Q. Were they given to Mr. Fendler?

A. Yes, sir.

Q. Is there any reference in those notes to the financial statement about the fact that Lincoln Thrift Association's books have approximately 1.5 million dollars in fictitious assets?

A. Will you repeat that, please?

Q. Is there any notation that as to the 1.5 million dollars in assets that were placed on the books of Lincoln Thrift Association, June '74?

A. Yes, sir, they are categorized in various different documents.

Q. Was Mr. Fendler aware that the notes to the financial statement were to be an integral part of that?

A. Yes, sir.

* * *

Q. Both [Fendler and Holman] were aware that the display of financial statement or balance sheet without the notes would misrepresent the financial condition of Lincoln Thrift Association?

A. Yes, sir.

This testimony, at least in part, was responsible for appellant's indictment in Counts Thirteen, Fourteen and Fifteen.

In the latter part of October, 1977, appellant's counsel discovered that Foreman had not prepared footnotes for the Financial Statement until after it had been filed with the Commission.[30] Appellant's counsel also learned that the state was purportedly aware of this information prior to the indictment being handed down, but had nevertheless failed to inform the court, opposing counsel or the grand jury of the possible discrepancy in Foreman's testimony. Upon the revela-

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[30] Apparently, Foreman decided not to prepare footnotes for the financial statement because they would have been identical to footnotes attached to another Lincoln Thrift financial statement which was filed in August of 1974.

tion of these facts, appellant promptly moved the court to dismiss the entire indictment (17 counts) on the basis of "prosecutorial misconduct." Appellant relies heavily on the case of *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974), in support of his position. In *Basurto,* a person named Barron, who was subsequently named in the indictment as a co-conspirator but not as a defendant, testified concerning appellant's activities in the conspiracy before the grand jury which brought the indictment. Prior to the commencement of trial, Barron informed the prosecuting attorney that he had committed perjury before the grand jury in material respects. After learning of the perjury, the prosecutor informed opposing counsel, but failed to notify either the court or the grand jury. The Court of Appeals held:

> that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel — and, if the perjury may be material, also the grand jury — in order that appropriate action may be taken. 497 F.2d at 785, 786.

In our opinion, the factual posture of *Basurto* is clearly distinguishable from the facts of the present case. Not only is there some real doubt as to whether Foreman actually perjured himself,[31] but appellant has also failed to sufficiently establish that the prosecution was *aware* of the perjury and that the alleged perjured testimony was *material* to the indict-

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[31] While we admit that Foreman's testimony was far from a model of clarity and probably was misleading, Foreman did in fact prepare footnotes for the Financial Statement subsequent to its filing with the Commission and purportedly furnished the completed work product to appellant. Furthermore, the footnotes were an integral part of the Financial Statement for without them the Statement was misleading.

ment on Counts Three and Twelve, which are the only counts before this Court in this appeal. *See State* v. *Jacobson,* 22 Ariz. App. 128, 524 P.2d 962 (1974); *State* v. *Brewer,* 26 Ariz. App. 408, 549 P.2d 188 (1976).

Appellant also claims that the above information was exculpatory evidence which should have been presented to the grand jury by the prosecution. While there is some doubt as to whether the information was in fact guilt negating, we need not address that issue because the Supreme Court recently observed in *State* v. *Baumann* No. 4879 (Supreme Court Filed March 26, 1980) that:

> The contention that a grand jury must consider all exculpatory evidence misreads the grand jury's primary function of determining whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it. (citations omitted) Any more would put grand juries in the business of holding minitrials. (citations omitted) slip op. at 6.

Moreover, the alleged exculpatory evidence applied only to Counts Thirteen, Fourteen and Fifteen of the indictment; consequently, it would have been error if the trial court had dismissed any of the other counts for the above cited reason. *See State* v. *Jones,* 120 Ariz. 556, 587 P.2d 742 (1978).

Discovery

Appellant contends that Rule 15.2(c), Arizona Rules of Criminal Procedure, 17 A.R.S., which requires a defendant to disclose the names and addresses of all persons whom he intends to call as witnesses at trial, is violative of his constitutional right against self-incrimination. U.S. Const. amend. V. Arizona. Const. art. 2 §10. We do not agree. While our Supreme Court has upheld the validity of Rule 15.2, *Wright* v. *Superior Court,* 110 Ariz. 265, 517 P.2d 1261 (1974); *State* v. *Talley,* 112 Ariz. 268, 540 P.2d 1249 (1975), no Arizona appellate decision has specifically addressed this Fifth Amendment question. Nevertheless, we believe that the case of

Williams v. *Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), is dispositive of the issue. In *Williams,* the United States Supreme Court held that the privilege against self-incrimination was not violated by a pretrial discovery provision which required a defendant to disclose the names and addresses of his alibi witnesses. While the court's holding was limited to the pretrial discovery of alibi witnesses, we believe that the logic and reasoning of that decision are just as applicable here.

Appellant's reliance on case law of sister jurisdictions, which have invalidated similar discovery provisions based on *state* constitutional self-incrimination grounds is neither controlling nor persuasive, *Prudhomme* v. *Superior Court of Los Angeles County,* 2 Cal. 3d 320, 466 P.2d 673 (1970); *Scott* v. *State,* 519 P.2d 774 (Alaska, 1974), since our Supreme Court has held that Article 2, §10 of the Arizona Constitution does not afford a criminal defendant any greater protection than the Fifth Amendment of the United States Constitution. *State* v. *White,* 102 Ariz. 162, 426 P.2d 796 (1967).

Appellant further contends that the trial court's order precluding him from calling two specific witnesses for lack of compliance with Rule 15.2, Arizona Rules of Criminal Procedure, 17 A.R.S., violated his constitutional right to a fair trial. U.S. Const. amends. VI, XIV.

On March 21, 1977, the state filed its initial disclosure pursuant to Rule 15.1, Arizona Rules of Criminal Procedure, 17 A.R.S. When appellant failed to make the required reciprocal disclosures pursuant to Rule 15.2, the state, on April 6, 1977, moved the trial court to compel disclosure. On July 6, 1977, the trial court ordered appellant to file his initial disclosure within fifteen days. Appellant failed to comply. On August 19, 1977, the trial court again ordered appellant to comply with Rule 15.2 or face the possibility of sanctions. Finally, on September 2, 1977, appellant filed his initial disclosure which contained, in part, the names of over one thousand prospective witnesses. The names of the two witnesses in question, Messrs, Schaffer and Pierson were

listed, but their addresses were designated as unknown. On September 14, 1977, the state filed a motion complaining about the inadequacy of appellant's disclosure, because, among other deficiencies, the disclosure contained 131 names without addresses. The trial court agreed and ordered appellant to disclose the names and *addresses* of all witnesses he intended to call. Appellant responded by filing an extensive amended disclosure statement; however, the addresses of Schaffer and Pierson were once again omitted. On October 6, 1977, the state moved the trial court to preclude appellant from calling any witnesses whose name and address had not been disclosed.[32] The motion was granted. In spite of that order, appellant filed numerous supplemental disclosures containing the names and addresses of various prospective witnesses, however, no effort was made to supply the missing addresses of Schaffer and Pierson. On January 9, 1978, the defense presented its list of prospective witnesses. The state objected to certain names on the list, including Schaffer and Pierson, and moved the court to enforce its prior exclusionary order. Several days later the trial court entertained extensive argument on the issue.[33] The defense contended that they were not put on notice of the relevance of Schaffer's testimony until the middle of the state's case when the state questioned, allegedly for the first time, the accuracy of the 74-1 entry entitled "investment securities". Appellant further argued that the state was aware of Schaffer's address as early as the convening of the state grand jury,[34] and therefore any surprise or

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[32] We note that appellant's amended disclosure still contained 106 names without accompanying addresses.

[33] Appellant informed the court that Pierson would be called only if Schaffer was unavailable, but that Schaffer assured him he would testify. Consequently, the argument focused solely on Schaffer's testimony because of the cumulative nature of Pierson's testimony. As a result, our discussion and decision rests on the arguments relating to Schaffer.

[34] It appears that both Schaffer's and Pierson's names were read to the state grand jury as potential witnesses. However, their addresses were not disclosed.

prejudice was due to the state's own negligence in failing to schedule an interview. The prosecution countered by arguing that not only was Schaffer's testimony irrelevant, but permitting him to testify would prejudice the state's case because it had relied on the court's prior order. The trial court reaffirmed its prior position and precluded the defense from calling either witness based upon its determination that the defense had received adequate notice on the "investment security" issue so that no surprise was involved.

Rule 15.2(c) states:

> c. Disclosures by Defendant. Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant *shall* make available to the prosecutor for examination and reproduction:
>
> > (1) the names and addresses of all persons, other than the defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case. (emphasis supplied)

Rule 15.7 further provides that:

> a. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:
>
> . . .
>
> > (4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed. . . .

While the appropriate sanction for noncompliance lies within the sound discretion of the trial court, *State* v. *Smith,* 123 Ariz. 243, 599 P.2d 199 (1979), *State* v. *Clark,* 112 Ariz. 493, 543 P.2d 1122 (1975), the trial court "should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible. . . ." *State* v. *Smith,* 123 Ariz. at

252, 599 P.2d at 208 (1975). Moreover, precluding a witness from testifying should only be invoked "in those cases where other less stringent sanctions are not applicable to effect the ends of justice."[35] *State* v. *Gutierrez,* 121 Ariz. 176, 181, 589 P.2d 50, 55 (App. 1978); *State* v. *Smith, State* v. *Fierro.*

It is glaringly apparent from examining the record that appellant willfully failed to comply with Rule 15.2(c) and the numerous discovery orders of the trial court. Despite this fact, appellant would have us disregard his flagrant abuse of the rules based upon the state's purported awareness of the witnesses' location prior to trial and the alleged prejudice suffered by appellant as a result of the exclusionary order. While we admit that Schaffer's testimony might have been relevant, we are of the opinion that appellant's offer of proof was insufficient to fully inform the court of the relevancy, let alone the vitality, of the proposed testimony. While appellant's counsel made some very broad assertions regarding the prospective content of Schaffer's testimony, counsel became extremely evasive when the court and opposing counsel attempted to inquire as to specifics. It is also apparent that the defense sensed the need to offer Schaffer himself to effectively clear the air concerning his testimony, since they insisted on securing Schaffer's attendance to make an offer of proof, an event, we note, which never occurred. Another factor of some import in our decision concerns the tardiness of appellant's claim. If Schaffer's testimony was so vital to the "investment security" issue, then why did the defense wait for almost two months after they discovered that it was an issue to inform the trial court or opposing counsel that they needed relief from the trial court's prior order concerning the preclusion of witnesses without addresses.[36] To wait until the presentation

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[35] While we are aware that *Smith* articulated specific standards for determining whether a witness should be precluded from testifying, in the absence of a specific ruling requiring retroactive application, we do not believe that it is appropriate to apply that specific standard to the instant case.

[36] Through their argument to the trial court, the defense acknowledged their awareness of the issue no later than November 21, 1977.

of their own case to indicate that they actually intended to call Schaffer might well have prejudiced the state's case.

Based upon the foregoing, we find neither justification for appellant's conduct nor prejudice to his defense. Consequently, the trial court acted properly in precluding the witnesses' testimony.

However, even assuming, arguendo, that the trial court erred in precluding the testimony, the evidence on the other entries was of such an overwhelming nature that we believe any error was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Conspiracy Count

Appellant next contends that the trial court committed "fundamental" error when it allowed the state to introduce evidence pertaining to the conspiracy count (Count One).

The facts are as follows: On September 30, 1977, appellant filed a pretrial motion to dismiss Count One on the basis of duplicity. The motion was denied. Thereafter, the trial commenced and the state introduced evidence bearing on the conspiracy charge. While the jury subsequently found appellant guilty of several charges, including conspiracy, the trial court reversed its prior position and dismissed Count One on the basis that it was duplicitous.

Appellant now claims that he was denied due process and a fair trial because the trial court's failure to dismiss Count One prior to trial resulted in the introduction of highly prejudicial evidence which would have otherwise been inadmissible.

Appellant prefaces his argument by conceding that the vast majority of the evidence in question was admitted without objection.[37] He also acknowledges that he is unable,

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[37] As a result, appellant attempts to avoid the waiver of such issue by characterizing the error as "fundamental". *See* Rule 19.3

except in two instances, which will be subsequently discussed, to point to any evidence which would have been inadmissible if the pretrial motion had been granted. Nevertheless, appellant proposes that we should *presume* that he was prejudiced to the extent that it constituted "fundamental" error because the jury *may* have been influenced by evidence relating to a defectively pleaded count.[38] In our opinion, we see no justifiable reason for setting aside appellant's convictions based upon his mere conjecture that he may have been somehow prejudiced. We have reviewed the evidence pertaining to the substantive counts in question and find that it amply supports the jury's verdicts. Consequently, even if the evidence relating to the conspiracy was erroneously admitted, we believe that such error was harmless beyond a reasonable doubt. *Chapman* v. *California.*

In conjunction with his general attack on the admission of evidence relating to Count One, appellant additionally claims that the trial court committed "fundamental" error when it allowed Leonard Foreman (co-defendant) to testify that he plead guilty to one of the offenses (conspiracy) with which appellant was charged without subsequently instructing the jury that such plea was not to be considered as substantive evidence of appellant's guilt.

Leonard Foreman's guilty plea first came to light, or its existence was at least implied, during defense counsel's opening statement to the jury when he suggested that Foreman's forthcoming testimony should be viewed with a jaundiced eye in light of his plea bargain agreement with the state which required him to "testify good."[39]

Arizona Rules of Criminal Procedure, 17 A.R.S. We also note that the objections that were actually made generally pertained to the relevancy of the evidence as it pertained to the conspiracy count.

[38] Whether Count One was actually duplicitous is the subject of an appeal by the state in *State* v. *Fendler,* 1 CA-CR 3400, filed Sept. 11, 1980.

[39] We note that the state was specifically precluded from addressing this subject in its opening statement.

Anticipating the defense's attack on Foreman's credibility, the state, on direct examination, solicited Foreman's admission that he had entered into a plea bargain agreement with the state and plead guilty to the charge of conspiracy. Appellant's counsel did not object to this line of questioning or the subsequent admission of the plea agreement.[40]

We further note that the trial court failed to give a limiting instruction to the jury to the effect that Foreman's guilty plea was not to be considered as evidence of appellant's guilt.

The general rule in this jurisdiction is that where two or more persons are charged with the same offense, the fact that one defendant has plead guilty is not admissible as substantive evidence of the other's guilt. *State* v. *McDonald,* 117 Ariz. 159, 571 P.2d 656 (1977), *United States* v. *King,* 505 F.2d 602 (5th Cir., 1974). The basis for this rule is founded upon the notion that a defendant is entitled to have the question of his guilt or innocence rest upon the evidence against him, rather than on a co-defendant's guilty plea to the same offense. *United States* v. *Fleetwood,* 528 F.2d 528, 532 (5th Cir. 1976), *Babb* v. *United States,* 218 F.2d 538, 542 (5th Cir. 1955). However, the introduction of a co-defendant's guilty plea is permissible for certain limited purposes such as where it tends to impeach a witness' credibility in order to prevent the defense from creating a misleading impression that the state has something to hide. *State* v. *McDonald,* 117 Ariz. at 161, 571 P.2d at 658, *United States* v. *King,* 505 F.2d at 607, *United States* v. *Del Purgatorio,* 411 F.2d 84, 87 (1969).

In light of the defense's opening remarks, we are not convinced that the evidence in question was erroneously admitted. In our opinion, the state was entitled to purge any

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[40] Furthermore, appellant's counsel readdressed the subject of the guilty plea during his cross-examination of Foreman and in his closing argument to the jury. The state also addressed the subject matter in its final closing argument.

possible misimpression left by the defense to the effect that the state was secreting material information which directly bore on a forthcoming witness' credibility. However, even assuming that the evidence was improperly admitted, the fact that a jury is informed of a co-defendant's guilty plea does not automatically constitute "fundamental" error. *State* v. *McDonald, United States* v. *King*. This would be true even if the trial court subsequently failed to give a limiting instruction. *State* v. *McDonald, United States* v. *King*. Therefore, under ordinary circumstances, appellant's failure to object to the admission of such evidence or request a cautionary instruction would bar him from raising the issue on appeal.[41] *State* v. *Wilson,* 113 Ariz. 308, 553 P.2d 235 (1976). Rule 19.3, 21.3, Arizona Rules of Criminal Procedure, 17 A.R.S.

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[41] The state contends that appellant never requested a cautionary instruction to the effect that Foreman's guilty plea was not to be considered as substantive of appellant's guilt. We agree. Appellant, on the other hand, claims that the following requested instruction, which the court rejected, qualified as such an instruction:

> One who testifies under a partial grant of immunity with a promise from the government that he will not be prosecuted for some offenses or has been given promises with respect to sentences he will receive, is a competent witness. His testimony may be received in evidence and considered by the jury even though not corroborated or supported by other evidence.
>
> Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the testimony may be colored in such a way as to further the witness's own interest, for a witness who realizes that he may procure his own freedom by incriminating another has a motive to falsify. After such consideration, you may give the testimony of the immunized witness such weight as you feel it deserves.

In our opinion, not only was the above instruction insufficient to warn the jury as to the effect of a co-defendant's plea, it could have had the opposite effect and mislead the jury into believing that it could consider the guilty plea as evidence of appellant's guilt. Furthermore, we believe that the trial court did not err in refusing to give the above instruction because the same subject matter was adequately covered by the instructions actually given by the court. *State* v. *Kelley,* 110 Ariz. 196, 515 P.2d 569 (1973). 553 P.2d 235 (1976). Rule 19.3, 21.3, Arizona Rules of Criminal Procedure, 17 A.R.S.

However, in *McDonald,* our Supreme Court held that if a jury is informed of a co-defendant's guilty plea, but no cautionary instruction is requested or given, the reviewing court must examine the facts and circumstances of the case in order to determine whether the jury's verdict was possibly influenced thereby prejudicing the appellant's case to the extent that it constituted "fundamental" error. However, as noted earlier, the evidence of appellant's guilt on the substantive counts was simply overwhelming. As a result, any error in the introduction of the guilty plea or in the trial court's failure to instruct on its effect was harmless beyond a reasonable doubt. *State* v. *McDonald, Chapman* v. *California.*

Appellant further contends that the admission of Leonard Foreman's plea agreement constituted "fundamental" error. For the same reasons previously discussed, we find that any error in the admission of such evidence was harmless beyond a reasonable doubt. *Chapman* v. *California.*

In section XI of appellant's opening brief in 1 CA-CR 3376, he sets forth numerous miscellaneous points which he contends require reversal. Since appellant has not argued these propositions, we consider them to be abandoned. Rule 31.13, Arizona Rules of Criminal Procedure, 17 A.R.S.; *State* v. *Smith.*

We have also reviewed the remaining issues asserted by appellant, with the exception of those we specifically declined to address relating to the tax count, and find them totally without merit. Therefore, in accordance with the foregoing opinion, appellant's conviction and sentence on Count Twelve (failure to file a state corporate income tax return) is reversed and remanded for a new trial, while his conviction and sentence on Count Three (false book entry) is affirmed.

/s/ LAURANCE T. WREN
Laurance T. Wren
Vice Chief Judge

CONCURRING:

/s/ DONALD F. FROEB
Donald F. Froeb
Presiding Judge

/s/ FRANCIS J. DONOFRIO
Francis J. Donofrio
Judge

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
STATE OF ARIZONA

No. CR 96776

THE STATE OF ARIZONA, *Plaintiff,*

v.

ROBERT H. FENDLER, *Defendants*

JUDGMENT

Division 8, April 14, 1978
Honorable Charles L. Hardy, Judge

It is the Judgment of the Court that you, ROBERT FENDLER, are guilty of the crime of false book entry as alleged in count three of the indictment and as punishment the Court sentences you to serve not less than four nor more than five years in the Arizona State Prison.

It is the Judgment of the Court that you, ROBERT FENDLER, are guilty of the crime of failure to file a tax return as alleged in court twelve in the indictment and as punishment the Court sentences you to serve not less than one nor more than three years in the Arizona State Prison, both of these terms to run concurrently. It is ordered that you surrender yourself to the custody of the Sheriff of Maricopa County on April 21, 1978.

Sentence to commence from the time you are in the custody of the Sheriff.

Charles L. Hardy,
Judge

EXHIBIT C

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CR 3376
1 CA-CR 3748
(Consolidated)

Maricopa County
Superior Court No.
CR-96776 SGJ

STATE OF ARIZONA, *Appellee,*

v.

ROBERT H. FENDLER, *Appellant.*

ORDER

The Court, Presiding Judge Donald F. Froeb and Judges Francis J. Donofrio and Laurance T. Wren, having conferred,

IT IS ORDERED vacating the order dated December 9, 1980.

IT IS FURTHER ORDERED denying both appellee's and appellant's motions for rehearing.

DATED this 11 day of December, 1980.

/s/ DONALD F. FROEB
Donald F. Froeb
Presiding Judge
Department A

A true copy of the foregoing order was mailed this 11th day of December, 1980, to:

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Appellant

GLEN D. CLARK, *Clerk*

By JOAN W. HOWARD
Deputy Clerk

EXHIBIT D

SUPREME COURT
STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
PHOENIX 85007

Supreme Court No. 5162-PR

Court of Appeals
Nos. 1 CA-CR 3376 and
1CA-CR 3748
(Consolidated)

Maricopa County
No. CR-96776 SGJ

STATE OF ARIZONA, *Appellee,*

v.

ROBERT H. FENDLER, *Appellant.*

The following action was taken by the Supreme Court of the State of Arizona on December 23, 1980 in regard to the above-entitled cause:

"ORDERED: Petitions for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 24th day of December, 1980.

MARYANN HOPKINS-YOUNG,
Clerk

/s/ By ILLEGIBLE
Deputy Clerk

To:

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HON. ROBERT C. BROOMFIELD, PRESIDING JUDGE, MARICOPA COUNTY SUPERIOR COURT, 201 WEST JEFFERSON STREET, PHOENIX, ARIZONA 85003

GLEN D. CLARK, CLERK, COURT OF APPEALS, DIVISION ONE, STATE CAPITOL BUILDING, WEST WING, PHOENIX, ARIZONA 85007

ROBERT H. FENDLER, P. O. BOX 21776, PHOENIX, ARIZONA 85036

EXHIBIT E

Daily Transcript page 59, line 7 (1/12/78)

THE COURT: Mr. Schaeffer was disclosed.

Daily Transcript, 1/12/78; beginning at p. 64, line 22

THE COURT: During the recess I examined Mr. Forman's testimony in the grand jury transcript, and have on page 89 on February 8th, last year, where he's talking about adjusting entry 74-1, those corresponding entries were investment securities 250,000 which were an actual asset. Statutory Reserve, 140,000 actual asset. And then Fendler created assets goodwill, account acquisition and retention and branch offices, so forth. And then there is other testimony that goes along in that vein. So I think Mr. Horn is right, that until this trial there was never any notice to the defendants that there was a chance that the investment security entry itself was a false entry or represented false value.

Daily Transcript, 1/12/78; beginning at p. 67, line 16

THE COURT: Wait a minute Mr. Lebowitz. Due process requires a defendant to be apprised of what he is charged with.

MR. LEBOWITZ: He was.

THE COURT: And here he's charged with making false entries. Doesn't say which entries are false in the indictment. So you have to go to the grand jury transcript.

MR. LEBOWITZ: It said 74-1.

THE COURT: Doesn't say what part of that is false. Then you look at the testimony before the grand jury. There are three counts there which are described as fictious, goodwill, account acquisition and retention, and branch offices, and that's the whole testimony for pages and pages - where that's discussed. There's never anything that I see — I've been able to come across.

MR. LEBOWITZ: Your Honor, the charge is 74-1 in its entirety. 74-1 is an entity. There are not separate charges for each facet of that are false. Now we gave them all the

discovery that we had regarding — relating to 74-1 and what people would say about it, we gave to them in March.

* * *

Daily Transcript, 1/12/78; beginning at p. 74, line 7

THE COURT: What is Mr. Schaeffer going to testify to, Mr. Horn?

MR. HORN: The stock was American Thrift Leasing stock, yes, American Thrift Leasing has its asset acquired the First Industrial Bank of Adams County, and it was because of that acquisition the book value increased from 10,000 to 250,000, and Mr. Schaeffer has direct knowledge of that, so for him to come in and say that's a phony asset when it's based on the acquisition of a bank is ludicrous. And Mr. Schaeffer knows that, was in the middle of the transaction, has a real estate background himself and will testify concerning the assets of that stock is based on, but will also be able to testify as to value of that stock.

* * *

Daily Transcript, 1/12/78; beginning at p. 80, line 19

MR. HORN: I want to offer Mr. Schaeffer's testimony on valuation. I want him to describe how it came about, how the valuation for purposes of the securities was determined. And he has — he's more than a lawyer. He has an extensive real estate background. He will qualify to have an opinion as he did at that time, and that will be his testimony.

MR. STORRS: His general knowledge about the bank and about the total circumstances surrounding it, because he was the Colorado lawyer.

* * *

Daily Transcript, 1/12/78; beginning at p. 82, line 27

MR. HORN: He does in the sense he knows how the figure investment securities valued at $250,000 carried on 74-1 came about and the basis behind it.

* * *

Daily Transcript, 1/12/78; beginning at p. 83, line 5

MR HORN: It isn't the placing of the figure on the books that they are suggesting makes it a crime. It's that that figure represents a phony asset. That's their theory that makes it a crime. Now, he has knowledge of whether it's a viable, legitimate asset or a phony asset.

Daily Transcript, 1/12/78; beginning at p. 143

THE COURT: . . . I am inclined to sustain the State's objection to his testifying (Schaeffer) . . . I recall very definitely saying that the name is not enough, they need an address so they can put somebody in contact.

Daily Transcript, 1/12/78; beginning at p. 145, line 26

THE COURT: Gentlemen, somewhere along the line I'm quite sure I made an order where you did not list the address of a witness you weren't going to call him.

EXHIBIT F

Rule 15.2 Disclosure By Defendant

a. Physical Evidence. At any time after the filing in Superior Court of an indictment or information, upon written request of the prosecutor, the defendant shall:

(1) Appear in a line-up;

(2) Speak for identification by witnesses;

(3) Be fingerprinted, palm-printed, foot-printed or voiceprinted;

(4) Pose for photographs not involving re-enactment of an event;

(5) Try on clothing;

(6) Permit the taking of samples of his hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his body;

(7) Provide specimens of his handwriting; or

(8) Submit to a reasonable physical or medical inspection of his body, provided such inspection does not include psychiatric or psychological examination;

In connection with the particular crime with which he is charged. He shall be entitled to the presence of counsel at the taking of such evidence. This rule shall supplement and not limit any other procedures established by law.

b. Notice of Defenses. Within 20 days after the arraignment in Superior Court, the defendant shall provide the prosecutor with a written notice specifying all defenses as to which he will introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each defense the persons, including the defendant himself, whom he will call as witnesses at trial in support thereof. It may be signed by either the defendant or his counsel, and shall be filed with the court.

PRECEDING PAGE WAS BLANK

c. Disclosures by Defendant. Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant shall make available to the prosecutor for examination and reproduction:

(1) The names and addresses of all persons, other than the defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(2) The names and addresses of experts whom he will call at trial, together with the results of his physical examinations and scientific tests, experiments or comparisons, including all written reports and statements, made by them in connection with the particular case; and

(3) A list of all papers, documents, photographs and other tangible objects which he will use at trial.

d. Additional Disclosure Upon Request and Specification. The defendant, upon written request, shall make available to the prosecutor for examination, testing, and reproduction any specified items contained in the list submitted under Rule 15.2(c)(3).

e. Extent of Defendant's Duty to Obtain Information. The defendant's obligation under this rule extends to material and information within the possession or control of the defendant, his attorneysaand agents.

f. Disclosure by Order of the Court. Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.2, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Comment

The first sign that the prosecution constitutionally could obtain some disclosure of the defendant's case before trial came in Jones v. Superior Court, 58 Cal.2d 56, 372 P.2d 919, 22 Cal.Rptr. 879, 96 A.L.R.2d 1213 (1962). But see Prudhomme v. Superior Court of Los Angeles County, 2 Cal.3rd 320, 466 P.2d 673, 85 Cal.Rptr. 129 (1970). Compelled defense disclosures now have a more certain basis as a result of the U.S. Supreme Court's decision in Williams v. Florida, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970).

Rule 15.2(a). This section closely parallels Ariz.Rev.Stat.Ann. §13-1424 (Supp. 1972) and ABA, Standards, supra, §3.1. Unlike §13-1424, however, the prosecutor need make no showing of cause, nor obtain any court order, to become entitled to the "non-testimonial" disclosures specified.

Section (A) is qualified in two ways. The accused is entitled to the presence of counsel at any such proceeding. See, *e. g.*, United States v. Wade, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed.2d 1149 (1967). And the prosecutor may use the proceeding only to obtain evidence related to the charge for which the defendant already stands accused; to investigate other crimes, the prosecutor must follow the procedures of §13-1424.

Rule 15.2(b). It is intended that the "notice of defenses" to be a broad disclosure of the defendant's case, including his rebuttal of the state's case as well as his own "case-in-chief." It is to include all matters which he will present at trial, including those which he intends to introduce by his own testimony.

The disclosure requirement goes considerably beyond notification of "affirmative defenses," yet is limited to matters as to which the defendant will introduce evidence. The limitation is designed to allow the defendant to argue deficiencies in the state's case (not requiring the presentation of defense evidence) without prior warning, and to make his

disclosure obligations sufficiently clear and predictable as to be enforceable.

Under Rule 15.4(c), the defendant is not required to raise at trial all defenses noted in the "notice" and no comment will be allowed on his failure to do so unless the court concludes that he abused the rules. Furthermore, the disclosure of a defense will not serve to alter the proceedings at trial.

The requirement of a detailed notification of defenses follows §3.3 of the ABA, Standards, supra (Supp. October 1970) and proposed Federal Rules of Criminal Procedure 12.1 and 12.2 (Preliminary Draft, April 1971). See also Ill.Rev.Stat. Ch. 110A §413(d) (Smith-Hurd 1972) and proposed Washington Rules of Criminal Procedure 4.7(b)(2)(xii), (xiii) and (xiv) (May 15, 1971).

The defendant is not required to disclose his testimony, but only the defense to be asserted or of the element of the offense to be attacked, in sufficient detail as to notify the prosecutor of the essence of the defense's case. Rules requiring advance notice of affirmative defenses — *e. g.*, alibi and insanity — have never been held to violate the privilege, even when they would be established by the defendant's own testimony (and even when they require specification of the place at which the defendant claims to have been, the time at which he was there, and the witnesses thereto). See, *e. g.*, State v. Wardius, 487 P.2d 1380 (Ore.App. 1971); State v. Nunn, 113 N.J.Super. 161, 273 A.2d 366 (App.Div. 1971); State ex rel. Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968) (cited in Williams, 399 U.S., at 84 n. 15) all holding that the defendant himself can be denied the right to testify to an alibi when he failed to give notice before trial as required by statute or rule.

Rule 15.2(c). This section closely parallels the prosecutor's disclosure obligations under Rules 15.1(a)(1), (a)(3) and (a)(4), except that it is limited to evidence which the defendant will offer at trial.

The extent of the defendant's duty to make facilities available for review and copying of materials and information is the same as that of the prosecutor. See comment to Rule 15.1 under Meaning of Terms and comment to Rule 15.1(c).

Rule 15.2(d). This section also directly parallels the corresponding prosecution disclosure requirement in Rule 15.1(c). The defendant may impose the same reasonable conditions on release of items of evidence which Rule 15.1(c) allows the prosecutor to attach.

Rule 15.2(e). This section sets forth the extent of the defendant's duty to obtain evidence for disclosure. See Rule 15.1(d) for the prosecution's similar duty.

Rule 15.2(f). This section gives the prosecutor the same right to request additional discovery given the defendant in Rule 15.1(e), with the additional warning that discretionary discovery from the defendant must also take account of his privilege against self-incrimination.

Rule 15.7 Sanctions

a. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

(1) Ordering disclosure of the information not previously disclosed.

(2) Granting a continuance.

(3) Holding a witness, party, or counsel in contempt.

(4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and

(5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

b. If the defendant fails to comply with Rule 15.2 the prosecution need make no further disclosure except material

or information which tends to mitigate or negate defendant's guilt as to the offense charged as set forth in Rule 15.1(a)(7).

Amended May 7, 1975, effective Aug. 1, 1975.

Office Supreme Court, U.S.
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MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ROBERT H. FENDLER, *Petitioner*,

v.

STATE OF ARIZONA, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION IN THE LOWER COURT

The opinion of the Arizona Court of Appeals is reported as *State v. Fendler*, ___ Ariz. ___, 622 P.2d 23 (Ct.App. 1980).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 15.7 of the Arizona Rules of Criminal Procedure, which authorized the trial court to exclude the testimony of two defense witnesses as a sanction for the defendant's noncompliance with Rule 15.2, is unconstitutional as a violation of the Sixth and Fourteenth Amendments.

2. Whether Rule 15.2 of the Arizona Rule of Criminal Procedure, which mandates disclosure of certain aspects of a defendant's case within twenty (20) days of arraignment, violates the Fifth Amendment privilege against self-incrimination.

SUMMARY OF ARGUMENT

Respondent State of Arizona joins Petitioner Robert H. Fendler in his request that this Court grant certiorari on the issue presented in Argument II of the Petition for Writ of Certiorari concerning whether the exclusion of a defense witness as a sanction for the defendant's failure to comply with a trial court's order of disclosure violates the Sixth and Fourteenth Amendments. This Court should grant certiorari because the issue presented raises a federal question of substantial importance to both state and federal courts which has not yet been addressed by this Court. Indeed, courts at every level, including this Court, have recognized but declined to rule on this issue of the constitutionality of sanctions imposed against a defendant who fails to comply with reciprocal discovery provisions. A review of the few decisions dealing with this issue indicates a great possibility of conflict between state courts, and between state courts and federal courts. This Court should, therefore, take jurisdiction of the issue of the constitutionality of discovery sanctions imposed against defendants who fail to comply with disclosure statutes or rules before it becomes a quagmire of confusing and conflicting decisions across the country.

Respondent asks this Court to deny the Petition for Writ of Certiorari on the issue presented in Argument I concerning whether reciprocal discovery rules requiring a defendant to disclose certain aspects of his case violates the Fifth and Fourteenth Amendments. This Court has fully addressed the issue in *Williams v. Florida*, 399 U.S. 78 (1970), and *Wardius v. Oregon*, 412 U.S. 470 (1973), and Petitioner has not provided any compelling reason to re-litigate the matter.

STATEMENT OF THE FACTS

Petitioner was charged on March 7, 1977, in a seventeen count indictment with criminal conduct in connection with the

operation of several thrift institutions headquartered in Arizona. Trial commenced on October 17, 1977, on twelve counts of the indictment. The trial lasted 4 ½ months, one of the longest criminal trials in Arizona history. On February 27, 1978, the jury found Petitioner guilty of conspiracy (A.R.S. § 13-331B), failure to file a corporate tax return (A.R.S. § 43-179f), and false book entry (A.R.S. § 10-193B). In a post-trial motion, the trial court dismissed the conspiracy count. On appeal, the Arizona Court of Appeals reversed Petitioner's conviction on the tax count. Thus, Petitioner is before this Court convicted of the crime of false book entry.

The false book entry conviction stems from Petitioner's directive in 1974 to his accountant that four intangible "asset" categories be posted and capitalized in the ledger of Lincoln Thrift Association, the largest member of petitioner's 50-corporation conglomerate. The posted "assets" were over $1 million in amount, but in fact were totally fictitious and valueless. In connection with this fraudulent transaction, petitioner received a controlling interest in a Phoenix area federally insured bank called the American Bank of Commerce.

On the issue of discovery, Respondent filed its initial Notice of Disclosure pursuant to Rule 15.1 of the Arizona Rules of Criminal Procedure on March 21, 1977. When Petitioner failed to make his required reciprocal discovery, Respondent asked the trial court to issue an order to compel disclosure. On July 6, 1977, the trial court ordered Petitioner to file his disclosure by July 21, 1977. Petition failed to comply. On August 19, 1977, the trial court again ordered Petitioner to comply or face possible sanctions under Rule 15.7. Finally, on September 2, 1977, Petitioner filed a notice of disclosure listing over 1,000 names of alleged prospective witnesses, 131 of which included no addresses. On September 14, 1977, the trial court ordered Petitioner to amend his notice to include addresses. Only 25 addresses were added to the list and no address was provided for

either witnesses John Schaffer or Thomas Pierson. On October 6, 1977, the trial court granted Respondent's motion to preclude Petitioner from calling any witness whose address was not included in the Notice of Disclosure. After the presentation of the prosecution's case in chief, Petitioner presented his list of names of potential witnesses and included Schaffer and Pierson. Respondent asked the trial court to enforce its October order precluding witnesses not properly disclosed. After extensive argument on the issue, the trial court reaffirmed its prior position and precluded Schaffer and Pierson from testifying.

In affirming the trial court's decision, the Arizona Court of Appeals found it "glaringly apparent" that Petitioner "willfully failed to comply with Rule 15.2" and that his conduct was a "flagrant abuse of the rules." *State v. Fendler*, *supra*, 622 P.2d at 41. Further, the Court of Appeals ruled that Petitoner's offer of proof concerning the relevancy of the proposed witnesses' testimony was insufficient. The appellate court was also influenced by the fact that after realizing the need to call Schaffer or Pierson because of the testimony of a state witness, Petitioner waited 2 months before informing the trial court and Respondent of his intention to ask the court to modify its preclusion order. By that time, the prosecution had rested its case and any modification of the October preclusion order might well have prejudiced Respondent. *State v. Fendler*, *supra*, 622 P.2d at 42. The Court of Appeals held that Petitioner's conduct was unjustified and that the preclusion order did not prejudice him. Alternatively, the appellate court held that the overwhelming nature of the evidence against Petitioner made any error regarding the preclusion order harmless error. *Id.*

ARIZONA DISCOVERY RULES

Arizona's criminal cases are conducted under an open and reciprocal discovery scheme, as provided in Arizona Rules of

Criminal Procedure, Rule 15.[1] Rule 15.2[2] lists the disclosure elements required of a defendant. The Comments, which are helpful to an understanding of the substance of the Rule 15.2,

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1. The subheadings for Rule 15 are indicative of the nature of the Rule:

15.1 Disclosure by state
15.2 Disclosure by defendant
15.3 Depositions
15.4 General Standards
15.5 Excision and Protective Orders
15.6 Continuing Duty to Disclose
15.7 Sanctions
15.8 Non-severability

2. Rule 15.2 *Disclosure by defendant*

a. *Physical Evidence*. At any time after the filing in Superior Court of an indictment or information upon written request of the prosecutor, the defendant shall:

(1) Appear in a line-up;

(2) Speak for identification by witnesses;

(3) Be fingerprinted, palm-printed, foot-printed or voiceprinted;

(4) Pose for photographs not involving re-enactment of an event;

(5) Try on clothing;

(6) Permit the taking of samples of his hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his body;

(7) Provide specimens of his handwriting; or

(8) Submit to a reasonable physical or medical inspection of his body, provided such inspection does not include psychiatric or psychological examination;

state that it is intended that the Notice of Defenses, required by Rule 15.2(b), be a broad disclosure of the defendant's case. The defendant is not required to raise all of the defenses listed in his

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In connection with the particular crime with which he is charged. He shall be entitled to the presence of counsel at the taking of such evidence. This rule shall supplement and not limit any other procedures established by law.

b. *Notice of Defenses.* Within 20 days after the arraignment in Superior Court, the defendant shall provide the prosecutor with a written notice specifying all defenses as to which he will introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each defense the persons, including the defendant himself, whom he will call as witnesses at trial in support thereof. It may be signed by either the defendant or his counsel, and shall be filed with the court.

c. *Disclosures by Defendant.* Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant shall make available to the prosecutor for examination and reproduction:

(1) The names and addresses of all persons, other than the defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(2) The names and addresses of experts whom he will call at trial, together with the results of his physical examinations and of scientific tests, experiments or comparisons, including all written reports and statements, made by them in connection with the particular case; and

(3) A list of all papers, documents, photographs and other tangible objects which he will use at trial.

d. *Additional Disclosure Upon Request and Specification.* The defendant upon written request, shall make available to the prosecutor for examination, testing, and reproduction any specified items contained in the list submitted under Rule 15.2(c)(3).

Notice of Defenses nor is he required to call all of the witnesses listed, and no comment is permitted on his failure to raise a defense or call a witness unless the trial court determines he abused the rules. A defendant is not required to disclose his own testimony, only the defense to be asserted or the element of the offenses to be attacked. He can argue deficiencies in the state's case without any prior disclosure.

Arizona's Rule 15 closely parallels Federal Rules of Criminal Procedure, Rule 16. As stated in the Advisory Committee Note to Rule 16:

> [B]roader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence . . . .

This is also the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) unanimously recommended broader discovery.

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e. *Extent of Defendant's Duty to Obtain Information.* The defendant's obligation under this rule extends to material and information within the possession or control of the defendant, his attorneys and agents.

f. *Disclosure by Order of the Court.* Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.2, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

The Arizona Supreme Court upheld the constitutionality of Rule 15.2 in *State v. Talley*, 112 Ariz. 268, 540 P.2d 1249 (1975). In *State v. Lawrence*, 112 Ariz. 20, 536 P.2d 1038 (1975), the Arizona Supreme Court said of Rule 15:

> The underlying principle of Rule 15 is adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides. *The rule to be effective, must be applied with equal force to both the prosecution and the defendant.* Indeed, Rule 15.8 recognized that if Rule 15.2(b) is unenforceable then 15.1(a)(1)(b) and (c) is null and void.

112 Ariz. at 22, 536 P.2d at 1040 (emphasis added).

The preclusion sanction of Rule 15.7 has been upheld by the Arizona Supreme Court in *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979), and *State v. Fierro*, 124 Ariz. 182, 603 P.2d 74 (1979). In *Smith* the Court held that, before a trial court precludes either party's witnesses as a discovery sanction, the court must make an inquiry into the surrounding circumstances to determine if less stringent sanctions can be used. The trial court was instructed to consider the importance of the precluded witness to the proponent's case, the level of surprise or prejudice to the opposing party, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances. In *State v. Fendler*, *supra*, the Court of Appeals did not rule on the issue whether the trial court held an adequate hearing before precluding witnesses Schaffer and Pierson because it held that the doctrine expounded in *Smith* would not be applied retroactively.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT A WRIT OF CERTIORARI ON THE ISSUE WHETHER A PRECLUSION SANCTION IMPOSED AGAINST A NON-COMPLYING DEFENDANT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *The Issue Presented Raises a Federal Question of Importance to Both Federal and State Courts.*

In two footnotes in two separate opinions, *Williams v. Florida*, 399 U.S. 78, n. 14 (1970) and *Wardius v. Oregon*, 412 U.S. 470, n. 4 (1973), the Supreme Court recognized the issue of the constitutionality of the imposition of sanctions against a defendant for failure to comply with discovery provisions, but declined to rule on the question since it had not been properly before the Court. The Court's recognition and avoidance has been followed by both federal courts and state courts, resulting in a relative dearth of case law on the issue. *See Cox v. Wyrick*, ___ F.2d ___ (8th Cir., Slip Opinion No. 80-1462, filed Feb. 25, 1981); *Robbins v. Cardwell*, 618 F.2d 581 at 583 and n. 4 (9th Cir. 1980); *Ronson v. Commissioner of Cor. of State of N.Y.*, 604 F.2d 176, n. 5 (2d Cir. 1979); *Commonwealth v. Edgerly*, 361 N.E.2d 1289, 1292 (Mass. 1977); *State v. Wolfe*, 542 P.2d 482, 485 (Ore. 1975); *State v. Nelson*, 545 P.2d 36, 38 (Wash.App. 1975). The question whether the Sixth Amendment is violated by precluding a witness because of a defendant's failure to comply with reciprocal discovery provisions is clearly and properly before the Supreme Court in the present case.

The importance of the issue presented stems from the fact that a cursory review of statutes and court rules discloses that the Federal Rules of Criminal Procedure and approximately 27 states have some form of reciprocal discovery provisions and the Federal Rules and 25 of these states allow a preclusion

sanction.[3] The two states that do not specifically include a preclusion sanction, Alaska and Idaho, leave all sanctions, which presumably includes preclusion, to the discretion of the trial court. Montana's and Wisconsin's primary sanction is preclusion.

These provisions were enacted in reaction to the decisions in *Williams* and *Wardius*, and have been repeatedly utilized in the absence of any guidelines from this Court. State courts and federal courts have proceeded under the assumption that reciprocal discovery provisions are constitutional under the reasoning of the *Williams* and *Wardius* opinions. *See State v. Talley*, 112 Ariz. 268, 540 P.2d 1249 (1975); *State ex rel Keller*

3.

Alaska	Rules of Crim. Pro., Rule 16(e)
Arizona	17A A.R.S. Rules of Crim. Pro., Rule 15.7
Arkansas	Rules of Crim. Pro., Rule 19.7
Colorado	Colo. R. Crim. P. Rule 16(g)
Florida	West's FSA Rules of Crim. Pro., Rule 3.220
Georgia	Code 27-1302
Illinois	Supreme Court Rules, Rule 413, SHA h. l10 A. 114.13
Idaho	Rules of Crim. Pro., Rule 16(g)
Kansas	KSA 22-3212(7)
Kentucky	Rules of Crim. Pro., Rule 7.24
Missouri	VAMR Crim. Rules 25.16
Massachusetts	Rules of Crim. Pro., Rule 14(c)
Montana	Montana Code Ann. § 46-15-302(b)
Nebraska	Rev. Stat. Neb. 1943 29-1919
New Mexico	Rules of Crim. Pro., Rule 30
New Jersey	Crim Rule 3.13-3(F)
New York	CPL 240.70
North Carolina	GS 15A-910
North Dakota	Rules of Crim. Pro., Rule 16(g)
Oregon	ORS 135.865
Pennsylvania	Pa.R.Crim.P., Rule 305(E)
South Dakota	Rules of Crim. Pro., Rule 16(d)(2)
United States	18 USC Federal Rules of Criminal Procedure, Rule 16(d)(2)

v. Criminal Ct. of Marion Cty., 317 N.E.2d 433 (Ind. 1974); *State v. Richardson*, 598 S.W.2d 176 (Mo.App. 1980); *State v. Nelson*, 545 P.2d 36 (Wash.App. 1975). State courts, faced with the issue of the constitutionality of sanctions against a defendant, have concluded that, since this Court condones reciprocal discovery and because the only method of effectuating the reciprocity of these provisions is to enforce them reciprocally, sanctions imposed against a recalcitrant defendant must be constitutional. *See State v. Fierro*, 124 Ariz. 182, 186, 602 P.2d 74, 80 (1979); *People v. Copicotto*, 428 N.Y.S.2d 649, 406 N.E.2d 465 (1980); *State v. Umfleet*, 587 S.W.2d 612 (Mo.App. 1979); *Ottinger v. State*, 370 N.E.2d 912 (Ind.App. 1977). Respondent requests this Court to grant certiorari on the issue presented for the benefit of the State of Arizona, the federal courts, and the various other state courts so that each jurisdiction will know what means are available to enforce its discovery provision and determine whether revisions are required in either substance or implementation of its discovery provision.[4]

Utah	Rev. Stat. Neb. 1943 29-1919
Vermont	Rules of Crim. Pro., Rule 16.2
Virginia	Code of Virginia SS 3A
Wisconsin	WSA SS 971.23

This list does not include notice of alibi and insanity defense provisions, as found, for example, at 18 USCA Federal Rules of Criminal Procedure, Rule 12. Some of these states listed have rules or statutes which incorporate the alibi and insanity defense notice with the broader discovery provisions. *See* 17A A.R.S. Rules of Criminal Procedure, Rule 15.2(b). There are other states not listed here which have notice of alibi provisions which include preclusion as a sanction for failure to comply. See Mich. Stat. Ann. 28-1044. Many of the states not listed here provide a defendant only limited discovery to cover only *Brady* and *Jencks* material. *See* West. Va. Code ss 62-1B-2.

4. *See* Ariz. Rules of Crim. Pro. Rule 15.8, for example, which nullifies Rule 15.1(a)(1), (b), and (c) if Rule 15.2(b) or (c) is ruled unenforceable.

B. *This Court Should Grant Certiorari On The Issue Presented Because There Is A Conflict Of Decisions And A Potential Of An Even Greater Conflict.*

As stated earlier, several state courts, including Arizona, have upheld the constitutionality of imposing a preclusion sanction against a non-complying defendant. *See State v. Fierro*, 124 Ariz. 182, 186, 602 P.2d 74, 80 (1979); *People v. Copicotto*, 428 N.Y.S.2d 649, 406 N.E.2d 465 (1980); *State v. Umfleet*, 587 S.W.2d 612 (Mo.App., 1979); *Ottinger v. State*, 370 N.E.2d 912 (Ind.App., 1977). These state court decisions were recently contradicted by the Fifth Circuit Court of Appeals in *U.S. v. Davis*, 639 F.2d 239 (5th Cir. 1981), where the appellate court reversed the trial court's decision to exclude two defense witnesses because of the defendant's failure to comply with a disclosure order.

In *Davis*, the Court of Appeals held that the compulsory process clause of the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants. The trial court precluded the two defense witnesses under Federal Rules of Criminal Procedure, Rule 16(d)(2). The degree of and motivation for the noncompliance is not stated in the record. The Court of Appeals based its decision on an analogy to the unconstitutionality of excluding a defense witness who violates a sequestration order, citing *Holder v. U.S.*, 150 U.S. 91 (1893), and *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972).

Besides confirming the lack of more pertinent and recent case law on the issue, the impact of the *Davis* opinion is uncertain. The case arose from a challenge to the Federal Rules of Criminal Procedure, yet the Circuit Court's decision is in terms of a general constitutional prohibition. It is unclear whether the ruling affects the sanction provisions of the Florida, Georgia and Texas reciprocal discovery rules. The Department of Justice has decided not to appeal the *Davis* decision.

Because the various state court decisions upholding preclusion sanctions on constitutional grounds conflict with the Fifth Circuit's decision in *U.S. v. Davis*, there is a need for this Court to speak on the issue. This need is intensified by the fact that more circuit courts of appeal and state courts are sure to be faced with similar defense challenges in the near future.

Further complicating the question is the possibility of another federal or state court rejecting the *Davis* court's reliance on the sequestration analogy and instead referring to case law dealing with the notice of alibi provisions of Federal Rules of Criminal Procedure, Rule 12.1. There are several federal cases upholding the preclusion of a defense alibi witness because of a defendant's failure to comply with Rule 12.1. *See U.S. v. Fitts*, 576 F.2d 837 (8th Cir. 1978); *U.S. v. White*, 583 F.2d 899 (6th Cir. 1978); *U.S. v. Barron*, 575 F.2d 752 (9th Cir. 1978); *U.S. v. Pulvirenti*, 408 F.Supp. 12 (D.Mich. 1976).

Respondent contends that, until the Supreme Court takes jurisdiction of the question of the constitutionality of the imposition of sanctions against a non-complying defendant, courts on every level will be confused as to the state of the law on the issue. Respondent, therefore, respectfully requests that this Court grant certiorari on Argument II of the Petition for Writ of Certiorari.

II. THE SUPREME COURT SHOULD DENY CERTIORARI ON THE ISSUE WHETHER REQUIRING A DEFENDANT TO DISCLOSE CERTAIN ASPECTS OF HIS CASE VIOLATES THE FIFTH AND FOURTEENTH AMENDEMENTS.

Petitioner claims his Fifth Amendment privilege against self incrimination was infringed because Arizona Rules of Criminal Procedure Rule 15.2 required him to list himself as a witness and disclose other aspects of his case. A similar challenge was made before this Court in *Williams v. Florida*, 399 U.S. 78 (1970), a case dealing with a defendant required to provide pre-trial notice of an alibi defense, including a list of witnesses. In the

opinion authored by Justice White, this Court held that, since no constitutional infringement was caused by a defendant having to decide to testify or present a defense during trial, a rule which merely accelerates the timing of the disclosure is not constitutionally impermissible. *Williams v. Florida*, *supra*, 399 U.S. at 84-86.

Although reversing the conviction because the discovery provision involved was not reciprocal, the Supreme Court reaffirmed the *Williams* decision in *Wardius v. Oregon*, 412 U.S. 470 (1973.). The Court in *Wardius* affirmed a state's right to experiment with systems of broad discovery designed to achieve the goals of providing both parties the maximum possible amount of information with which to prepare their cases, thereby reducing the possibility of surprise at trial. The growth of such discovery devices, the Court ruled, was a "salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius v. Oregon*, *supra*, 412 U.S. at 474-75.

Analogous to the situation in *Williams*, Petitioner was not required to assert any particular defense nor was he precluded from later abandoning any defense noticed or changing his mind about whether to testify.[5] The decision of which defenses to assert and whether to testify was left to Petitioner's unfettered choice. See *Williams v. Florida*, *supra*, 399 U.S. at 86. The fact that Rule 15.2 required Petitioner to accelerate his decision on these issues so that he could file a Notice of Defenses (ostensibly) 20 days after arraignment did not violate his Fifth Amendment privilege. *See Williams v. Florida*, *supra*, 399 U.S. at 86. Since Petitioner has presented no new ground of error nor any compelling reason to re-litigate *Williams* and

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5. Indeed, a prosecutor is forbidden to comment on a defendant's failure to testify by this Court's decision in *Griffith v. California*, 380 U.S. 609 (1965).

Wardius, Respondent respectfully asks this Court to deny a writ of certiorari on Petitioner's claim that Rule 15.2 violates the Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court grant the Petition For Writ Of Certiorari on the Sixth Amendment issue concerning the preclusion of defense witnesses, but deny the Petition For Writ Of Certiorari with respect to the Fifth Amendment claim relating to the constitutionality of requiring disclosure of certain aspects of the defense case.

Respectfully submitted.

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